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THE MISMEASUREMENT OF LEGAL PRAGMATISM

DOUGLAS LIND*

“Pragmatism?!—is that all you have to offer?”¹

—Tom Stoppard, *Rosencrantz & Guildenstern are Dead*

I. INTRODUCTION

Legal pragmatism is much misunderstood. Critics vilify it as an “amorphous,”² anti-theoretical³ and skeptical jurisprudence,⁴ one that

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1. TOM STOPPARD, *ROSENCRANTZ & GUILDENSTERN ARE DEAD* 58 (Henry Popkin ed., 1967).

2. Richard H. Weisberg, *It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal*, 18 CARDOZO L. REV. 85, 85 (1996) (reproaching legal pragmatism for an “amorphous nature”). Accord Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 444 (1990) (dismissing pragmatism as “either empty or innocuous”); Mark Tushnet, *Pragmatism and Judgment: A Comment on Lund*, 99 NW. U. L. REV. 289, 290 (2004) (“[Pragmatism is] an all-purpose and almost meaningless label for quite traditional judicial decisions”).

3. See, e.g., P. S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 5 (1987) (describing pragmatism as a “general aversion to theory”); Ronald J. Bacigal, *Implied Hearsay: Defusing the Battle Line between Pragmatism and Theory*, 11 S. ILL. U. L.J. 1127, 1144 (1987) (rejecting a pragmatic understanding of the hearsay rule as an anti-academic approach that sacrifices “intellectual purity” and common sense while “losing sight of the fundamental purpose of the hearsay rule”); Smith, *supra* note 2, at 437 (“[H]ostility to abstract theory is a central feature in the pragmatic temperament.”).

4. See RONALD DWORKIN, *LAW'S EMPIRE* 95, 151, 160–61 (1986); Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033, 1042 (1991); Murray J. Leaf, *Pragmatic Legal Norms*, in *RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE* 72, 73 (Alfonso Morales ed., 2003); Andrew J. Morris, *Some Challenges for Legal Pragmatism: A Closer Look at Pragmatic Legal Reasoning*, 28 N. ILL. U. L. REV. 1, 14–15 (2007); Dmitri N. Shalin,

languishes in indeterminacy,⁵ depreciates the distinctive structure of legal reasoning and decision-making,⁶ and commits a host of other jurisprudential sins.⁷ Even some of its advocates tend to see it as philosophically mushy and malleable, a jurisprudence shorn of theoretical rigidity, amenable to whatever ends and purposes they wish.⁸ To both friend and foe, legal pragmatism thus emerges as something less than “real” jurisprudence. Like the sorry lackey of the Stoppardian Hamlet’s court,⁹ serious legal scholars tend to treat pragmatism as a theoretical backwater, readily dismissed or manipulated at will.

Among the most persistent criticisms of legal pragmatism is the claim that it represents nothing more than an opportunistic “result-oriented”

Legal Pragmatism, an Ideal Speech Situation, and the Fully Embodied Democratic Process, 5 NEV. L.J. 433, 446, 477 (2005).

5. E.g., Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1444, 1447–48, 1454 (1994); R. George Wright, *Pragmatism and Freedom of Speech*, 80 N.D. L. REV. 103, 104–05 (2004). Cf. Shalin asserts that that pragmatism entails a “notion of emergent determinism which . . . suggests that our principles do not merely describe the world out there but also help usher it in,” such that for pragmatism “[i]ndeterminacy” does not mean the paucity of terms as much as their overabundance.” Shalin, *supra* note 4, at 461.

6. See RONALD DWORKIN, *JUSTICE IN ROBES* 21–24, 36–48 (2006); LAW’S EMPIRE, *supra* note 4, at 151–64; BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 129–30 (2006); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 219–21 (1993); Morris, *supra* note 4, at 1–5.

7. See, e.g., Cloud, *supra* note 6, at 201–08, 301–02 (arguing that pragmatist judicial reasoning in Fourth Amendment jurisprudence has created unprincipled, illogical, and theoretically incoherent cases that have diminished the scope of individual liberty while enhancing government power); Cook, *supra* note 5, at 1432, 1443, 1449, 1453, 1457–58 (charging pragmatism, especially as espoused by John Dewey, with having bankrupted American jurisprudence by “dethroning” God and replacing normative discourse grounded in religious faith with “raw faith in ‘the power of intelligence,’” the experimental method of science, and a “blind” commitment to a “radical [and dangerous] democratic culture”); Weisberg, *supra* note 2, at 86–87 (expressing alarm toward legal pragmatism as an “intensely ‘problematic,’” overly conservative method that is “harmful to contemporary legal thought and practice”); Wright, *supra* note 5, at 104 (“Pragmatist doctrines ultimately tend to drain the life from our most adequate and circumstantially appropriate moral vocabularies and . . . in free speech adjudication ultimately leads to a normatively flattened free speech law”). Compare Cook, *supra* note 5, at 1447 (“[John Dewey] would consider it ridiculous to reduce constitutional meaning . . . [to] the intention of the Framers. . . .”) with Steven Knapp, *Practice, Purpose, and Interpretive Controversy*, in *PRAGMATISM IN LAW AND SOCIETY*, 323, 323 (Michael Brint & William Weaver eds., 1991) (“[A] ‘pragmatist’ account of interpretive controversy . . . [that treats] the meaning of any text . . . [as] what the text’s author or authors intended it to mean.”).

8. See, e.g., John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917, 919, 935 (2008) (arguing that originalism in constitutional interpretation is defensible on pragmatic grounds since it can lead to “good consequences”); Daria Roithmayr, “Easy for You to Say”: *An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism*, 57 U. MIAMI L. REV. 939, 953–54 (2003) (advocating a way of thinking about law labeled “radical pragmatism,” defined as a “protean, unobjective, and unanchored . . . ad-hoc and improvisational approach” that could be useful for the “disempowered community”).

9. See STOPPARD, *supra* note 1, at 58.

standpoint. David Luban, for example, asserts that “legal pragmatism is *result-oriented* or *instrumental*. Its focus is the well-being of the community, not the purity or integrity of legal doctrine.”¹⁰ To Luban, legal pragmatism allows for almost anything in judicial decision-making, so long as the outcome appears directed to the good of the community. Thus, while he acknowledges that legal pragmatists typically favor adherence to precedent, Luban chides them for doing so not based on principle, but only because doing so is “instrumentally important.”¹¹ Whether it be the doctrine of precedent in general or some specific doctrinal rule, Luban avers that pragmatism recognizes no principled commitment to consistency or coherence in legal decision. “Pragmatists . . . see no inherent virtue in logical consistency if it leads to unacceptable outcomes,” he writes.¹² Rather, “what pragmatists seek in legal reasoning is not logical neatness but persuasion in the service of reasonable outcomes.”¹³

In similar fashion, Ronald Dworkin characterizes pragmatism as sanctioning an approach to adjudication that “holds that judges should always decide the cases before them in a forward-looking, consequentialist style.”¹⁴ Dworkin agrees with Luban that pragmatism recognizes no principled constraints on judicial freedom. By his understanding, pragmatism admits that judges, at their discretion and for reasons of expediency, may adhere to precedent. It even allows that instrumental considerations generally lead them that way.¹⁵ But Dworkin claims that pragmatism does not compel judges to follow precedent (or even abide by legislative judgment) as a matter of principle.¹⁶ He accordingly sees pragmatism as a worrisome interpretive conception of law that sacrifices principle and integrity for whatever outcomes would seem to be “best for the future without concern for the past.”¹⁷ To Dworkin, that is, legal pragmatism offers nothing but a directive to judges to “make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake.”¹⁸

10. David Luban, *What’s Pragmatic About Legal Pragmatism?* 18 CARDOZO L. REV. 43, 43 (1996) (emphasis added).

11. *See id.* (“Pragmatists nevertheless recognize that conforming to inherited legal doctrine and attending to history may be good for the community, so doctrinal integrity remains instrumentally important.”).

12. *Id.* at 45.

13. *Id.*

14. DWORKIN, JUSTICE IN ROBES, *supra* note 6, at 21.

15. *See id.* at 21–22.

16. *See id.* at 22.

17. DWORKIN, LAW’S EMPIRE, *supra* note 4, at 151.

18. *Id.* at 95. *Accord* DWORKIN, JUSTICE IN ROBES, *supra* note 6, at 21.

In this Article, I defend legal pragmatism against charges by Luban, Dworkin, and others¹⁹ that it is a bland, manipulable result-oriented jurisprudence. The starting-point is to unpack what is meant by “result-orientation.” Toward that end, I consider briefly how consequences factor in certain contrasting ethical theories, with the moral philosophy of utilitarianism serving as a prototype of result-oriented thinking. I then turn to legal pragmatism. Drawing upon sources contemporary and classical, I argue that legal pragmatism, like the philosophy of pragmatism more generally, cannot accurately be characterized as result-oriented. My argument is grounded in the classical pragmatist tradition of William James and John Dewey, and is informed by their descendants in analytic philosophy, C.I. Lewis, W.V.O. Quine, and Hilary Putnam.²⁰ It further finds inspiration in the jurisprudential writings of Benjamin Cardozo. These sources reveal that, in its classical and analytic sense, pragmatism is indeed a philosophy that considers consequences to be relevant in matters of deliberation and judgment. But it does not appeal to consequences in the material, outcome-determinative sense Luban and Dworkin suggest.

19. See, e.g., TAMANAHA, *LAW AS A MEANS TO AN END*, *supra* note 6, at 129–30 (arguing that pragmatism calls for judges to decide cases according to their conception of the most reasonable outcome); Nicholas Bamforth, *Reform of Public Law: Pragmatism or Principle?* 58 MOD. L. REV. 722, 724 (1995) (“Pragmatic consideration . . . looks to the likely consequences of a particular outcome”); Cloud, *supra* note 6, at 212–14 (claiming that legal pragmatism directs judges to base their decisions on the results they consider best); Cook, *supra* note 5, at 1447 (criticizing the application of John Dewey’s pragmatism to law in part because Dewey allegedly would treat reaching the “right answer” in adjudication as calling for nothing more than inquiry into “which consequences one finds most desirable”); Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, in *RENASCENT PRAGMATISM*, *supra* note 4, at 220, 223–26 (arguing that pragmatism suffers from the serious deficiency of allowing ends to justify means); Morris, *supra* note 4, at 13 (“[P]robably the central point of pragmatism is to produce the best substantive outcome in the specific context of each individual case.”) (footnote omitted); Daniel J. Morrissey, *Pragmatism and the Politics of Meaning*, 43 DRAKE L. REV. 615, 631 (1995) (presenting Oliver Wendell Holmes, Jr., as a pragmatist who “offered a practical, result-oriented approach” to legal theory); Shalin, *supra* note 4, at 458 (“Rightly or wrongly, weighing consequences is perceived as the chief method of [at least some forms of] pragmatist adjudication. . . . Zeroing in on legal outcomes and their long-term impact on society poses serious challenges.”) (footnote omitted); Lael Daniel Weinberger, *The Monument and the Message: Pragmatism and Principle in Establishment Clause Ten Commandments Litigation*, 14 TEX. WESLEYAN L. REV. 393, 411 (2008) (describing legal pragmatism as a “results-oriented approach”).

20. By following the classical and analytic strand of pragmatist thought, I thus eschew the popular postmodern relativistic pragmatism of Richard Rorty. See, e.g., RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* (1999); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); Richard Rorty, *Postmodern Bourgeois Liberalism*, in *PRAGMATISM: A READER* 329 (Louis Menand ed., 1997). Additionally, the pragmatist jurisprudence I here advance differs importantly from Richard Posner’s lively theory of pragmatic adjudication. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 40, 230–65 (2008); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 1–96 (2003); RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227–310 (1999); RICHARD A. POSNER, *OVERCOMING LAW* 387–405 (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454–69 (1990). See *infra* text accompanying notes 378–87.

Rather, pragmatism looks to consequences as epistemological indicia or measures of truth. Pragmatically speaking, true ideas hold great instrumental value—in William James’s terms, the truth is “*good in the way of belief*.”²¹ The ability to distinguish in practical affairs between truth and falsehood is a central cognitive skill with incontestable practical benefits to human life. We search for truth not in idle curiosity but from practical need. Interpretation, classification, and conceptual ordering across the reaches of experience factor importantly in sorting out confusion and in settling questions that impact our lives and future conduct. Reflective knowing, i.e., the possession of a coherent set of “true” beliefs, is thus, as John Dewey phrased it, “instrumental to a control of the environment.”²² Grasping a rational conceptual system—a comprehensive, consistent, and orderly arrangement of ideas and beliefs—accordingly produces, in the most robust pragmatic sense, “desirable consequences.”²³

Contrary to the disputations of Luban, Dworkin, and others, pragmatic concern for consequences thus has nothing to do with satisfying a ready-made teleological standard. To say that pragmatism entails an exclusively forward-looking consequentialism grievously mismeasures and distorts the integrity of pragmatist philosophy. For as I detail below, pragmatism’s mainstream classical and analytic tradition sets forth a philosophical method only. By express design, it endorses no special results and favors “no dogmas, and no doctrines save its method.”²⁴ Unequivocally, it shuns the commitment to result-orientation imagined by its critics. Instead, it embraces the very conditions of coherence and consistency they say it lacks. For to pragmatism, conclusions and judgments are true (and hence consequentially desirable) insofar as they satisfy intellectually by *working* to resolve trouble and uncertainty in some aspect of the human environment while *fitting* logically within a coherent and usable system of belief. Unfolding this understanding of pragmatism, as applied to law, is the purpose of this Article.

II. RESULT-ORIENTATION

Result-oriented theories render judgments according to whether expected outcomes satisfy some standard or set of criteria determined prior

21. WILLIAM JAMES, PRAGMATISM 42 (Harvard Univ. Press 1975) (1907).

22. JOHN DEWEY, ESSAYS IN EXPERIMENTAL LOGIC 30 (Dover Pub. 1954) (1916).

23. *Id.* at 318.

24. JAMES, PRAGMATISM, *supra* note 21, at 32.

to and independent of the activity judged. Consequentialist ethics such as utilitarianism provide the paradigm and a sound working model for understanding result-oriented theories.

A. *Utilitarian Ethics*

Utilitarianism draws upon the familiar and deeply plausible intuition that right conduct is associated with good consequences. In its classical form, the utilitarian theory stipulates that the rightness of an act depends entirely on the goodness or badness of the consequences that attend it.²⁵ This unqualified priority that utilitarianism gives to consequences is what makes it a result-oriented standpoint. To the utilitarian, moral deliberation and judgment are confined to a comparison of expected outcomes. In prescribing that an act is morally right if and only if it leads to the best state of affairs overall, utilitarianism excludes as extraneous all aspects of the actions under consideration that do not bear upon the result.

The utilitarian standpoint sounds simple. Its singular focus on consequences suggests ease of application. Yet utilitarian philosophers have frequently disagreed over how to apply it. Disagreement goes to several points: how to characterize the consequential dimension of utility (as happiness, pleasure, interests, or preference-satisfaction);²⁶ whether to treat all pleasures and preferences as commensurate or differentiated according to qualitative worth²⁷ or distributive fairness;²⁸ whether any sources of satisfaction (e.g., pleasures of malevolence) should be excluded from utility calculations as intrinsically bad;²⁹ how best to understand the notion of utility maximization (sum total or average utility);³⁰ and whether to weigh an act's likely consequences directly on the scale of utility (act-utilitarianism) or by way of a two-step process focused on the consequences associated with moral rules (rule-utilitarianism) or general

25. See ROLF SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS: A UTILITARIAN ACCOUNT OF SOCIAL UNION AND THE RULE OF LAW* 1 (1975); R.G. Frey, *Introduction: Utilitarianism and Persons*, in *UTILITY AND RIGHTS* 3, 4 (R.G. Frey ed., 1984).

26. See SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS*, *supra* note 25, at 26–28; SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 27–30 (Rev. ed. 1994); Frey, *supra* note 25, at 11.

27. See JOHN STUART MILL, *UTILITARIANISM* 8–10 (Hackett Pub. 1979) (1861); G.E. MOORE, *PRINCIPIA ETHICA* 77–81 (1903); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM FOR & AGAINST* 1, 14–25 (1973).

28. E.g., SCHEFFLER, *supra* note 26, at 31.

29. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234–35, 276–77 (1977); MOORE, *supra* note 27, at 207–14; ROLF SARTORIUS, *Persons and Property*, in *UTILITY AND RIGHTS*, *supra* note 25, at 196, 197; Smart, *supra* note 27, at 25–27.

30. See Sartorius, *Persons and Property*, *supra* note 29, at 197.

act-types (utilitarian generalization).³¹ Commonly today, the term “utilitarianism” thus denotes a broad range of moral theories. As stated by philosopher Rolf Sartorius, “there are almost as many forms of utilitarianism worthy of serious consideration as there are serious philosophers with express utilitarian sympathies.”³²

Nonetheless, several features characterize utilitarian ethics. Utilitarians tend to posit certain states of affairs as intrinsically good, while treating others as bad.³³ They presuppose that the moral rightness of an action is to be determined solely by considering its “total outcome”³⁴ or “total expectable consequences,”³⁵ i.e., the overall quantity of good and bad states of affairs likely to result should the action be performed.³⁶ In addition, they maintain that each person ought to do “that act which, of all the acts open to the person, would issue in the obtaining of the best total outcome.”³⁷ Finally, the utilitarian assumes an attitude of relative indifference to the reasoning or motive behind actions judged right or wrong according to their consequences.³⁸ What matters to the utilitarian is that the best total outcome is achieved—irrespective of why or in what way.³⁹ As John Stuart Mill stated, “[i]t is the business of ethics to tell us what are our duties, or by what test we may know them; but no system of

31. See RICHARD BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 271–85, 292–300 (1979); SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS*, *supra* note 25, at 12–13.

32. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS*, *supra* note 25, at 12.

33. See, e.g., Frey, *supra* note 25, at 4; Judith Jarvis Thomson, *Goodness and Utilitarianism*, *PROC. & ADDRESSES AM. PHIL. ASS'N*, Jan. 1994, at 7, 7; Bernard Williams, *A Critique of Utilitarianism*, in SMART & WILLIAMS, *supra* note 27, at 75, 83–84 (1973).

34. Thomson, *supra* note 33, at 7.

35. BRANDT, *supra* note 31, at 281.

36. See Frey, *supra* note 25, at 4; H.L.A. Hart, *Utilitarianism and Natural Rights*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 181, 182 (1983); Smart, *supra* note 27, at 1, 4, 12–13, 45; Thomson, *supra* note 33, at 7; Williams, *supra* note 33, at 85–86.

37. Thomson, *supra* note 33, at 7. Accord BRANDT, *supra* note 31, at 271, 278; SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS*, *supra* note 25, at 12; Frey, *supra* note 25, at 4.

38. See, e.g., BRANDT, *supra* note 31, at 272 (“Historically defenders of the [utilitarian] theory have had little to say about [motivation]. . . .”); MILL, *supra* note 27, at 18 (“Motive has nothing to do with the morality of the action.”). Cf. HENRY SIDGWICK, *THE METHODS OF ETHICS* 493 (7th ed., Hackett 1981) (1907) (“[T]he Utilitarian will praise the Dispositions or permanent qualities of character of which felicitific conduct is conceived to be the result, and the Motives that are conceived to prompt to it when it would be a clear gain to the general happiness that these should become more frequent. . . .”).

39. See MILL, *supra* note 27, at 18. Mill argues that, for the utilitarian, motive has no bearing on the rightness of action. (“He who saves a fellow creature from drowning does what is morally right, whether his motive be duty or the hope of being paid for his trouble. . . .”); Williams, *supra* note 33, at 87 (“[F]or the consequentialist, even a situation . . . in which the action itself possesses intrinsic value is one in which the rightness of the act is derived from the goodness of a certain state of affairs—the act is right *because* the state of affairs which consists in its being done is better than any other state of affairs accessible to the agent.”).

ethics requires that the sole motive of all we do shall be a feeling of duty.”⁴⁰ *Intention* matters for the utilitarian: morally right action comes from *intending* to do the act which happens to lead to the best overall outcome.⁴¹ Acting from the *motive* of achieving that end is irrelevant, even though motive is what propels the actual *doing* or *practice* of the action deemed morally right.⁴²

B. Practice-Oriented Ethics

Practice-oriented theories, to the contrary, look for the justification of judgments in the performance or “doing” of the judged activity itself. In the realm of ethical theory, the contrast between result-orientation and practice-orientation was well-made by Aristotle:

In the arts, excellence lies in the result itself, so that it is sufficient if it is of a certain kind. But in the case of the virtues an act is not performed justly or with self-control [i.e., morally] if the act itself is of a certain kind, but only if in addition the agent has certain characteristics as he performs it. . . .⁴³

The characteristics Aristotle went on to identify address the practice of the action—specifically, whether it was performed by a person of practical wisdom or reason: someone who knew what he or she was doing, chose to do the act, chose it for its own sake, and acted in a manner reflecting habit or consistency of character.⁴⁴ Aristotle’s ethics—often today termed “virtue ethics”—are thus fundamentally practice-oriented, theoretically riveted on the cognitive aspects of the practice or performance of the action judged right or wrong, not simply on its consequences or resulting outcome.⁴⁵

40. MILL, *supra* note 27, at 17.

41. *See id.* at 18 n.2 (“The morality of the action depends entirely upon the intention—that is, upon what the agent *wills to do*.”).

42. *See id.* at 17–20, 18 n.2 (“[I]t is a misapprehension of the utilitarian mode of thought to conceive it as implying that people should fix their minds upon so wide a generality as the world, or society at large. The great majority of good actions are intended not for the benefit of the world, but for that of individuals.”).

43. ARISTOTLE, NICOMACHEAN ETHICS 1105a26–31 (Martin Ostwald trans., 1962) (c. 330 B.C.).

44. *See id.* at 1105a32–34.

45. *See, e.g.*, STEPHEN G. SALKEVER, FINDING THE MEAN: THEORY AND PRACTICE IN ARISTOTELIAN POLITICAL PHILOSOPHY 65–71, 135–42 (1990) (emphasizing the importance of practice in Aristotle’s ethics and political philosophy); NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE’S THEORY OF VIRTUE 4–12 (1989) (discussing how Aristotle’s ethics emphasizes the development of good character and the process or practice of reasoned judgment as to right conduct);

While the difference between result-orientation and practice-orientation in ethical thought comes through vividly in the contrast between utilitarianism and Aristotle's ethics, the line separating the two approaches is not always so stark. Most significantly, it is critical to note that appeal to consequences or the anticipated results of action alone is not enough to make a method of judgment result-oriented. Recall the supreme principle of morality postulated by Immanuel Kant: the categorical imperative.⁴⁶ Among other things, the categorical imperative stipulates that an action is morally right if and only if it could be adopted as a universal rule or principle for all to follow.⁴⁷ This universal law formulation of the categorical imperative centers moral decision-making on the pithy command: "Act only according to that maxim by which you can at the same time will that it should become a universal law."⁴⁸

Kant insisted that in applying the categorical imperative the consequences of action are irrelevant. In this, he never wavered. Indeed, the key to his conceiving of the supreme principle of morality as a *categorical* imperative is that morality commands according to "unconditional practical laws"⁴⁹ that give no regard to desires,⁵⁰

J.L. Ackrill, *Aristotle on Action*, in AMÉLIE OKSENBERG RORTY, *ESSAYS ON ARISTOTLE'S ETHICS* 93, 94 (1980) ("Aristotle . . . draws a strong contrast between *what* is done . . . and *why* it is done.").

46. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 401–03, 412–34 (Lewis White Beck trans., 1969) (1785); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 225–27 (John Ladd trans., 2d ed., 1999) (1797). See generally PAUL GUYER, *KANT'S GROUNDWORK FOR THE METAPHYSICS OF MORALS* 73–134 (2007) (detailed study of Kant's categorical imperative); H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (1947) (classic study of Kant's ethics); JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 143–325 (2000) (highly important and informative set of lectures on Kant's moral philosophy).

47. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 30, 69–70 (Lewis White Beck trans., 1956) (1788); KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 46, at 402–03, 421–24; KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 46, at 225–26.

48. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 46, at 421. Accord KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 46, at 226 ("The supreme basic principle of moral philosophy is therefore: act according to a maxim that can at the same time be valid as a universal law.").

49. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 46, at 221. Accord KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 47, at 31 ("The practical rule is therefore unconditional and thus is thought of a priori as a categorically practical proposition."); KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, *supra* note 46, at 389 ("[A] law, if it is to hold morally, i.e., as a ground of obligation, must imply absolute necessity. . . .").

50. See KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 47, at 21 ("All practical principles which presuppose an object (material) of the faculty of desire as the determining ground of the will are without exception empirical and can furnish no practical laws.").

inclinations,⁵¹ or consequences.⁵² “The majesty of duty,” Kant wrote, “has nothing to do with the enjoyment of life.”⁵³ Material considerations, whether tied to happiness, prudence, self-interest, or even the overall well-being of society, have no bearing on the moral rightness of action.⁵⁴ From the moral point-of-view, right conduct is determined by unconditional conformance with the categorical imperative, no matter “the material of the action [or] its intended result.”⁵⁵

Nonetheless, Kant observed that giving heed to the expected results of action can sometimes determine compliance with the categorical imperative. On point is his famous example of false promising.⁵⁶ The situation is straightforward: “May I, when in distress, make a promise with the intention not to keep it?”⁵⁷ In reasoning that making a deceitful promise under such conditions is logically contrary to the categorical imperative, Kant wrote:

The shortest but most infallible way to find the answer to the question as to whether a deceitful promise is consistent with duty is

51. See, e.g., KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 400 (“[A]n act from duty wholly excludes the influence of inclination and therewith every object of the will . . .”); KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 46, at 216 (“[T]he laws of morality . . . command everyone without regard to their inclinations. . .”).

52. See, e.g., KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 401 (“[T]he moral worth of an action does not lie in the effect which is expected from it or in any principle of action which has to borrow its motive from this expected effect.”); *id.* at 402 (distinguishing between *morally* right action and action in conformance with morality but grounded in *prudence* and “based only on an apprehensive concern with consequences”); IMMANUEL KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON’T WORK IN PRACTICE 287 (E.B. Ashton trans., U. Pa. Press 1974) (1793) (rejecting hedonistic consequentialism on the ground that “[t]he will thus pursuant to the maxim of happiness vacillates between motivations, wondering what it should resolve upon. For it considers the outcome, and that is most uncertain.”).

53. KANT, CRITIQUE OF PRACTICAL REASON, *supra* note 47, at 88.

54. See *id.* at 21–26 (arguing that happiness, pleasure, etc. can never establish moral laws but only material practical principles for action); *id.* at 93 (“[T]o further one’s happiness can never be a direct duty, and even less can it be a principle of all duty.”); KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 414–19 (discussing how reasons for action that are based on considerations of prudence, happiness, etc. serve as hypothetical, not moral, imperatives); KANT, ON THE OLD SAW, *supra* note 52, at 279 (arguing that when reasoning from the standpoint of morality one must “completely *abstract* from . . . [the] consideration [of happiness and] . . . seek as best he can to be conscious that no *motive* derived from it has imperceptibly mingled with his definition of his duty. . .”).

55. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 416.

56. Kant discussed false promising several times. The most sustained treatment comes in the *Foundations of the Metaphysics of Morals*. See FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 402–03, 422, 429–30. For illuminating discussions of the example’s importance and logical argumentative structure, see FRED FELDMAN, INTRODUCTORY ETHICS 109–11 (1978); GUYER, *supra* note 46, at 52–53, 84–86, 120–21; PATON, *supra* note 46, at 152–54; RAWLS, *supra* note 46, at 170–72, 190–91.

57. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 46, at 402.

to ask myself: Would I be content that my maxim (of extricating myself from difficulty by a false promise) should hold as a universal law for myself as well as for others? . . . I immediately see that I could will the lie but not a universal law to lie. For with such a law there would be no promises at all, inasmuch as it would be futile to make a pretense of my intention in regard to future actions to those who would not believe this pretense or—if they overhastily did so—who would pay me back in my own coin. Thus my maxim would necessarily destroy itself as soon as it was made a universal law.⁵⁸

Kant's reasoning here fully takes consequences into account. Yet his approach is far from consequentialist (or result-oriented). Kant understood that an approach is result-oriented only if the consequences of action, as factored into some previously agreed-to standard, provide the determining ground of an action's rightness. If the consequences or anticipated results are only consulted for the information they provide about the full import of the action, information that ought (if not *must*) reasonably be considered by any person deliberating (*non-consequentially*) whether to perform the act, then taking consequences into account is fully compatible with a practice-oriented approach. For Kant, the critical consequential consideration in the case of false promising went to the foreseeable long-term results that would follow should false promising become a universal moral law. He recognized that such a general rule of moral conduct would eventually destroy the institution of promise-making, thereby undermining all opportunity for the making of false promises.⁵⁹ Universalization of the maxim of false promising is logically incoherent because it is self-contradictory. To will false promising as a universal moral rule would simultaneously be to will that it not become such a rule, for it would be to will the elimination of all opportunity to make such illicit promises.⁶⁰

Only by considering foreseeable consequences in this way was Kant able to demonstrate the contradiction in the conception of the false promise moral rule when considered under the universal law formulation of the categorical imperative. This does not, however, make his approach result-oriented. Kant dismissed the false promise moral rule because it could not logically be universalized, not because the consequences

58. *Id.* at 403.

59. *See id.* at 422 ("For the universality of [the] law [directing the making of deceitful promises] . . . would make the promise itself and the end to be accomplished by it impossible.").

60. *Id.* ("[I]t could never hold as a universal law of nature and be consistent with itself; rather it must necessarily contradict itself.").

attending its universalization would be less desirable than those likely to follow from some alternative state of affairs—such as those associated with a general rule of truth-telling.⁶¹ Kant understood very well that the distinguishing mark of result-oriented approaches is that the justification for judgment is grounded fully (in a determinative sense) in the consideration of outcomes or consequences, making the theoretic significance of such consequences far greater than that of being mere factors to consider in assessing compliance with a non-result-based standard.

III. PHILOSOPHY OF PRAGMATISM

Like Kant with regard to moral reasoning, pragmatism appeals to consequences in the epistemological realm in a non-result-oriented fashion. This becomes clear by considering certain central aspects of pragmatic philosophy. To begin, a caveat is in order: Pragmatism is not a philosophy of substantive answers. It offers a method. In the words of William James, one of its founders, pragmatism is less a strict doctrine than a handy label for “a number of [philosophic] tendencies that hitherto have lacked a collective name.”⁶² To James, the emergence of pragmatism marked a long overdue, yet “slow shifting in the philosophic perspective”⁶³ away from the highly rationalistic and abstract theories identified with Western philosophy. Among the philosophic tendencies gathered under the pragmatic label, four are of especial importance for considering the question of result-orientation: rejection of absolutism, radical empiricism, instrumentalism, and the connected ideas of workability and the evolutionary growth of knowledge.

61. The subtleness of Kant’s point has eluded many. Even John Stuart Mill failed to understand (or acknowledge) it. In *Utilitarianism*, Mill argued that every time Kant tried to apply the categorical imperative he wound up reasoning consequentially. See MILL, *supra* note 27, at 4 (“[W]hen [Kant] begins to deduce from [the categorical imperative] any of the actual duties of morality, he fails, almost grotesquely, to show that there would be any contradiction, any logical . . . impossibility. . . . All he shows is that the *consequences* of their universal adoption would be such as no one would choose to incur.”). See generally ALLEN W. WOOD, KANTIAN ETHICS 40–41, 259–69 (2008) (discussing the relevance of consequences for Kant’s ethics, while distinguishing his ethics from consequentialism).

62. JAMES, PRAGMATISM, *supra* note 21, at 29.

63. WILLIAM JAMES, ESSAYS IN RADICAL EMPIRICISM 190 (University of Nebraska Press 1996) (1912).

A. *Rejection of Absolutism*

Perhaps the dominant trademark of the Western philosophic tradition has been a theoretical preference for absolute, unbendable, *a priori* truths posited as antecedent, superordinate, and transcendent to knowledge based on experience and observation. Pragmatism challenges this tradition. William James regarded the absolutist search for “*the Truth*, conceived as the one answer, determinate and complete, to the one fixed enigma which the world is believed to propound”⁶⁴ as a form of “pseudo-rationality.”⁶⁵ It was, in his view, less a formula for grasping hold of truth than a psychosis of sentimental or “tender-minded”⁶⁶ intellectual longing.⁶⁷ In one sense, to follow this longing is innocuous. For James acknowledged that the absolutist vision of reality as perfect, complete, and fixed from all eternity does present a legitimate metaphysical hypothesis—just not a very good one.⁶⁸ He saw far greater explanatory value in the alternative hypothesis of pragmatism: that “reality . . . is still in the making,”⁶⁹ and that a degree of ignorance will ever taint our knowledge of it.⁷⁰

Yet there is another, more troubling side to absolutism. James cautioned that, “to understand life by [absolute] concepts is to arrest its movement.”⁷¹ Absolutism, that is, stunts the growth of understanding by discouraging further inquiry into matters and realms of knowledge said to be, for all time, determinate and fixed. Pragmatism, to the contrary, moves life forward. By treating all truth-claims as provisional and subject to future rejection and revision,⁷² the pragmatic method embraces a developmental view of knowledge that encourages continuous inquiry.

John Dewey, another principal architect of the philosophy of pragmatism, agreed that knowledge is ever dubitable and indefinite.⁷³ Yet

64. JAMES, PRAGMATISM, *supra* note 21, at 115.

65. WILLIAM JAMES, A PLURALISTIC UNIVERSE 73 (University of Nebraska Press 1996) (1909).

66. William James, *The Sentiment of Rationality*, in WILLIAM JAMES, THE WILL TO BELIEVE 63–64 (Dover Pub. 1956) (1897), *reprinted in* WILLIAM JAMES, ESSAYS IN PRAGMATISM 3, 4 (Hafner Press 1948).

67. JAMES, PRAGMATISM, *supra* note 21, at 126–27, 129.

68. See JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 71–81; JAMES, PRAGMATISM, *supra* note 21, at 81, 127–28.

69. JAMES, PRAGMATISM, *supra* note 21, at 123 (emphasis omitted).

70. *Id.* at 81; James, *The Sentiment of Rationality*, *supra* note 66, at 65–70, ESSAYS IN PRAGMATISM 5–8.

71. JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 244.

72. See, e.g., WILLIAM JAMES, THE MEANING OF TRUTH 220–23 (Harvard Univ. Press 1975) (1909); A PLURALISTIC UNIVERSE, *supra* note 65, at 395–400; PRAGMATISM, *supra* note 21, at 81–83, 124–25.

73. See JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE

for him, the importance in recognizing this went beyond epistemological method to the social good. Dewey was profoundly concerned with the construction of social realities and the making of practical, social, and moral judgments.⁷⁴ He maintained that social realities are always incomplete and not fully available to our understanding.⁷⁵ Hence, social judgments and moral standards should be understood as no more than “working hypotheses,”⁷⁶ provisional claims subject to question, testing, and revision.⁷⁷ To treat them otherwise, as forever immutable and unchangeable, both clogs understanding⁷⁸ and kindles social conflict and tension between cultures and societies.⁷⁹ Absolutism was thus to Dewey a dangerous metaphysical approach. Moral principles and standards, he thought, carry for the most part only the authority of custom.⁸⁰ Absolutists, however, deify such principles as eternal, final, and fixed, beyond rebuke or need of reevaluation.⁸¹ While this attitude may be feasible in small, insular, self-contained societies, Dewey trembled at its persistence in the modern world. He feared that staunch, unreflective adherence to supposedly eternal truths in a shrinking world undergoing vast social change and regular interaction between once-distant and still-disparate cultures is a recipe for “social clash, an irreconciled conflict of moral standards and purposes, the most serious form of [cultural] warfare.”⁸²

B. Radical Empiricism

Alongside its rejection of the rationalist, absolutist tradition, pragmatism embraces a robust empiricist account of knowledge and belief.

AND ACTION 33, 204–05 (1929); JOHN DEWEY, *HOW WE THINK* 130 (Prometheus 1991) (1910).

74. See, e.g., JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* vii–xxv, 71–75, 92–123 (Enlarged ed., Dover Pub. 2004) (1948); JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 1–83, 278–332 (1922).

75. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 73–74 (1927); DEWEY *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 330, 336–37.

76. DEWEY, *HUMAN NATURE AND CONDUCT*, *supra* note 74, at 56; John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924). Cf. *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 74, at 83 (“[N]otions, theories, [and] systems . . . must be regarded as hypotheses.”).

77. See DEWEY, *HUMAN NATURE AND CONDUCT*, *supra* note 74, at 279 (“[A]ll moral judgment is experimental and subject to revision.”).

78. See DEWEY, *THE QUEST FOR CERTAINTY*, *supra* note 73, at 5.

79. See DEWEY, *HUMAN NATURE AND CONDUCT*, *supra* note 74, at 78–83.

80. *Id.* at 81. Cf. *THE QUEST FOR CERTAINTY*, *supra* note 73, at 16 (“If one looks at the foundations of the philosophies of Plato and Aristotle as an anthropologist looks at his material, that is, as cultural subject-matter, it is clear that these philosophies were systematizations in rational form of the content of Greek religious and artistic beliefs.”).

81. DEWEY, *HUMAN NATURE AND CONDUCT*, *supra* note 74, at 81.

82. *Id.* at 82.

James liked to characterize pragmatism as a philosophy of “radical empiricism,”⁸³ a philosophy that views the world as a place “where experience and reality come to the same thing.”⁸⁴ All knowledge, according to James, begins with immediate “pure experience.”⁸⁵ Later pragmatists agreed. C. I. Lewis stipulated that “all which is knowable or even significantly thinkable must have reference to meanings which are sense-representable.”⁸⁶ W.V.O. Quine concurred, arguing that the most reasonable ontology is that which offers “the simplest conceptual scheme into which the disordered fragments of raw experience can be fitted and arranged.”⁸⁷ As described by James, we experience “primordial” concrete particulars,⁸⁸ “simple *that[s]*, as yet undifferentiated into thing and thought.”⁸⁹ Cognitively we convert this “quasi-chaos”⁹⁰ of immediately given “primal stuff”⁹¹ into a system of sensible experiences.⁹² While this “flux of sensible experience”⁹³ is characterized largely by discontinuity and disorder,⁹⁴ we strive through reflection to iron out the disorder—weighing consequences, modeling commonality, mirroring consistency—

83. See, e.g., JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 41–44, 47; JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 6–10; JAMES, *A PLURALISTIC UNIVERSE*, *supra* note 65, at 326, 372–73; William James, *Preface*, in *THE WILL TO BELIEVE*, *supra* note 66, at vii–ix.

84. JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 59. Accord WILLIAM JAMES, *SOME PROBLEMS OF PHILOSOPHY: A BEGINNING OF AN INTRODUCTION TO PHILOSOPHY* 96 (University of Nebraska Press 1996) (1911) (“[T]he whole of immediate perceptual experience . . . is reality intimately and concretely found.”). For detailed accounts of James’s notion of radical empiricism, see 2 ELIZABETH FLOWER & MURRAY G. MURPHEY, *A HISTORY OF PHILOSOPHY IN AMERICA* 662–73 (1977); Hilary Putnam, *Pragmatism and Realism*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 37, 46–51 (Morris Dickstein ed., 1998).

85. See, e.g., JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 23–24, 74; JAMES, *A PLURALISTIC UNIVERSE*, *supra* note 65, at 372.

86. C. I. LEWIS, *AN ANALYSIS OF KNOWLEDGE AND VALUATION* 171 (1946). Lewis acknowledged that there are certain types of knowledge, e.g., propositions of logical and mathematical truth, that are not empirical but knowable *a priori*. *Id.* at 24. Yet even there, truth-claims are subject to verification “by reference to sense meanings.” *Id.* at 171.

87. Willard van Orman Quine, *On What There Is*, in WILLARD VAN ORMAN QUINE, *FROM A LOGICAL POINT OF VIEW* 1, 16 (2d revised ed. 1980).

88. See JAMES, *SOME PROBLEMS OF PHILOSOPHY*, *supra* note 84, at 106 (“concrete percepts . . . [are] primordial . . .”).

89. JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 74. Accord *id.* at 23 (describing that which we directly experience as “plain, unqualified actuality, or existence, a simple *that*”).

90. *Id.* at 63, 65.

91. *Id.* at 4.

92. See C.I. LEWIS, *MIND AND THE WORLD ORDER* 29 (Dover Pub. 1956) (1929) (“The world of experience is not given in experience: it is constructed by thought from the data of sense.”).

93. JAMES, *A PLURALISTIC UNIVERSE*, *supra* note 65, at 73.

94. JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 63–64.

so as to construct “an orderly inner and outer world”⁹⁵ made up of things differentiated and named.

Reality as we know it is thus, according to pragmatism, a “man-made fabric,”⁹⁶ nothing more than “an accumulation of our own intellectual inventions.”⁹⁷ The world, as we conceive it, and “truth,” insofar as we grasp it, are products of our own evolutionary process of world-making.⁹⁸ As Hilary Putnam put it, “[w]e use our criteria of rational acceptability to build up a theoretical picture of the ‘empirical world.’”⁹⁹ Yet James insisted that as we go about world-making we “must neither admit . . . any element that is not directly experienced, nor exclude . . . any element that is directly experienced.”¹⁰⁰ The whole of truth and reality, as we conceive them, must “grow[] up inside of all the finite experiences.”¹⁰¹ Fidelity to that “originally chaotic pure experience[]”¹⁰² is thus essential so as to transcend it.

The fealty to experience that pragmatism requires cannot be overstated. James stressed that “a real place must be found for every kind of thing experienced, whether term or relation, in the final philosophic arrangement.”¹⁰³ George Herbert Mead argued that the whole of “the knowledge-process lies inside of experience.”¹⁰⁴ Putnam cautioned that we must continually revise our criteria of rational acceptability to ensure that they fit the picture of the empirical world that we devise.¹⁰⁵ Quine insisted that all systems of belief “must be kept squared with experience.”¹⁰⁶ This commitment to “radical” empiricism does not, however, make pragmatism

95. *Id.* at 35.

96. Willard van Orman Quine, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW*, *supra* note 87, at 20, 42.

97. JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 43. *Accord*, *PRAGMATISM*, *supra* note 21, at 122 (“[A]ltho [sic] the stubborn fact remains that there is a sensible flux, what is true of it seems from first to last to be largely a matter of our own creation.”).

98. *See, e.g.*, JAMES, *PRAGMATISM*, *supra* note 21, at 117 (“[T]o an unascertainable extent our truths are man-made products. . . .”); *id.* at 119 (“[T]he form and order in which the whole [of reality] is cast is flagrantly man-made.”); DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 30 (“[O]bjects of knowledge in their capacity of distinctive objects of knowledge are determined by intelligence.”); Quine, *Two Dogmas of Empiricism*, *supra* note 96, at 42 (“The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric.”).

99. HILARY PUTNAM, *REASON, TRUTH AND HISTORY* 134 (1981).

100. JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 42.

101. JAMES, *PRAGMATISM*, *supra* note 21, at 125.

102. JAMES, *ESSAYS IN RADICAL EMPIRICISM*, *supra* note 63, at 35.

103. *Id.* at 42.

104. GEORGE HERBERT MEAD, *THE PHILOSOPHY OF THE PRESENT* 131 (Prometheus Books 2002) (1932).

105. PUTNAM, *REASON, TRUTH AND HISTORY*, *supra* note 99, at 134.

106. Quine, *Two Dogmas of Empiricism*, *supra* note 96, at 45.

a philosophy that spurns concepts. Experience tenders new material to us daily. Were we to live only with the “crude flux of our merely feeling-experience,”¹⁰⁷ the horizon of our life would remain “so narrow[. . . as in the long run to defeat itself.”¹⁰⁸ Pragmatism recognizes this and “rejoice[s] that general terms are with us.”¹⁰⁹ It embraces concepts as “endlessly serviceable” and “useful substitutes for the overfulness of the facts,”¹¹⁰ substitutes that provide “a magnificent sketch-map for showing us our bearings.”¹¹¹

Conceptual systems thus possess great *pragmatic* value. They permit us to “harness up reality . . . in order to drive it the better.”¹¹² By combining concepts originating in “the sensible flux of the past,”¹¹³ we craft systems that allow us to interact with one another, anticipate experiences to come, and live under the order and direction of general rules. Valuable as they may be, systems of abstract concepts do not take us to a higher level of truth or reality.¹¹⁴ Concepts may provide a valuable “straightening of the

107. JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 217.

108. DEWEY, HOW WE THINK, *supra* note 73, at 139. *Accord* Willard van Orman Quine, *Identity, Ostension, and Hypostasis*, in FROM A LOGICAL POINT OF VIEW, *supra* note 87, at 65, 77 (noting that without general terms and concepts “language would be impossible. . . , and thought would come to very little.”).

109. Quine, *Identity, Ostension, and Hypostasis*, *supra* note 108, at 77.

110. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 109. *Accord id.* at 82 (abstract concepts are “genuinely useful”); JAMES, SOME PROBLEMS OF PHILOSOPHY, *supra* note 84, at 108 (“[Concepts] enlarge and prolong the perceptual experience which they envelop. . . .”); JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 217 (“[T]he advantages [of concepts] are endless.”); *id.* at 247 (“Sensible reality is too concrete to be entirely manageable. . . . But with our faculty of abstracting and fixing concepts we are there in a second. . . .”); JAMES, PRAGMATISM, *supra* note 21, at 33 (“[Concepts are of] great use . . . [in] summariz[ing] old facts and . . . lead[ing] to new ones.”); *id.* at 88 (concepts are “colossally useful”). *See also* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 86 (“[A]bstraction is indispensable if one experience is to be applicable in other experiences.”); DEWEY, HOW WE THINK, *supra* note 73, at 144 (“Every human being has both capabilities [of concrete and abstract thinking], and every individual will be more effective and happier if both powers are developed in easy and close interaction with each other.”).

111. JAMES, SOME PROBLEMS OF PHILOSOPHY, *supra* note 84, at 100. *Accord id.* at 108 (“Perception prompts our thought, and thought in turn enriches our perception.”); JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 217 (“[Concepts provide] a far more efficient handling of a given bit of experience. . . .”); *id.* at 235 (concepts serve as an invaluable tool “to lay hold of our experiences and to co-ordinate them withal.”).

112. JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 248. *Accord* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 86 (“Abstraction is liberation.”); DEWEY, HOW WE THINK, *supra* note 73, at 139 (“[Abstract thinking] is necessary . . . to the *emancipation* of practical life.”).

113. JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 246. *Accord* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 87 (“Abstraction and generalization have always been . . . close kin. . . . Abstraction sets free some factor so that it may be used. Generalization is the use.”); Quine, *Identity, Ostension, and Hypostasis*, *supra* note 108, at 77–79 (discussing how our conceptual mechanisms allow for effective communication, thought, and prediction).

114. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 84, 109. *Accord id.* at 110 (stating that abstract concepts are “less real, not more real” than concrete percepts); JAMES, SOME PROBLEMS OF

tangle of our experience's immediate flux and sensible variety,"¹¹⁵ but they remain just thin "[hu]man-made extracts from the temporal flux,"¹¹⁶ portraying nothing more than "bare abstract outline[s]"¹¹⁷ of that phenomenal, experiential realm from which they were drawn.

C. Instrumentalism

Not only is the empirical world chaotic and discontinuous, but from the standpoint of pragmatism is it also bereft of value. Nothing we perceive in the undifferentiated flux of experience is, in itself, good or bad. Nothing there is true or false. Everything simply is.¹¹⁸ Only by virtue of our acts of perception, rational reflection, and concept formation does that "primal stuff" of our immediate experience come to have any value, including *truth value*. Reflecting on experience, evaluating consequences, and marking points of commonality and consistency so as to craft general rules and concepts not only enables us to straighten the tangle of the primordial world but it empowers us to give meaning and value to the intrinsically undifferentiated and nameless. Conceptual thinking is thus critical for human life in that it permits a deeper understanding and adds value to the flux of concrete particulars presented to us in experience.¹¹⁹ This value added by the rational process of concept formation leads us to the third critical theme of pragmatism, its *instrumental* aspect.

Pragmatic instrumentalism affirms the contingent nature of meaning and truth. In the words of John Dewey, "meanings are indispensable instrumentalities of reflection"¹²⁰—not mere attributes of reference, but

PHILOSOPHY, *supra* note 84, at 97 ("[C]oncepts . . . must never be treated . . . as if they gave a deeper quality of truth. The deeper features of reality are found only in perceptual experience."); JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 218 (concepts are not "a superior type of being"); *id.* at 252 (conceptual knowledge is "more superficial" than bare empirical knowledge); DEWEY, HOW WE THINK, *supra* note 73, at 142 ("Nor is theoretical thinking a higher type of thinking than practical.").

115. JAMES, PRAGMATISM, *supra* note 21, at 87.

116. JAMES, A PLURALISTIC UNIVERSE, *supra* note 65, at 218. *Accord* JAMES, SOME PROBLEMS OF PHILOSOPHY, *supra* note 84, at 97 ("[T]hin extracts from perception . . .").

117. JAMES, SOME PROBLEMS OF PHILOSOPHY, *supra* note 84, at 99. *Accord* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 141 ("[S]keletonized abstraction[s]").

118. *See* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 106 ("Realities are not *true*, they *are*; and beliefs are true *of* them."); JAMES, PRAGMATISM, *supra* note 21, at 108 ("Truths emerge from facts. . . . The 'facts' themselves . . . are not *true*. They simply *are*. Truth is the function of the beliefs that start and terminate among them."); *id.* at 117 ("[T]he *first* part of reality . . . is the flux of our sensations. Sensations are forced upon us. . . . They are neither true nor false; they simply *are*.").

119. *See, e.g.*, DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 73, at 86 (describing how abstract thinking allows us to gain instructive value from concrete experiences).

120. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 46.

ascriptions of “value, importance.”¹²¹ So too is “truth.” The reflective construction of a belief-set of coherent, consistent truths is a practical cognitive activity of signal value. Truth, quite simply, “is profitable to our lives.”¹²² We value it because it is “helpful in life’s practical struggles.”¹²³ Truth is something that, “when given, . . . leads to desirable consequences”¹²⁴ and, when possessed, gives *satisfaction*—“that specific *truth*-satisfaction, compared with which all other satisfactions are the hollowest humbug.”¹²⁵ In the famous words of William James, “[t]he true,’ to put it very briefly, is only the expedient in the way of our thinking.”¹²⁶

To James, we can aptly characterize truth in this instrumental sense as “essentially an affair of leading.”¹²⁷ He reasoned:

The importance to human life of having true beliefs about matters of fact is a thing too notorious. We live in a world of realities that can be infinitely useful or infinitely harmful. Ideas that tell us which of them to expect count as the true ideas in all this primary sphere of verification, and the pursuit of such ideas is a primary human duty. The possession of truth, so far from being here an end in itself, is only a preliminary means towards other vital satisfactions. . . . The

121. *Id.* at 311.

122. JAMES, PRAGMATISM, *supra* note 21, at 42. *Accord* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 47 (“Absolute or no absolute, the concrete truth *for us* will always be that way of thinking in which our various experiences most profitably combine.”).

123. JAMES, PRAGMATISM, *supra* note 21, at 42. *Accord*, DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90 (describing the instrumental value of truth in terms of “demonstrated capacity for . . . guidance” out of situations of trouble and perplexity); HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 73 (1995) (arguing that, for pragmatism, inquiry toward the attainment of knowledge has “*instrumental*” value in that it “helps us achieve. . . practical goals”). *See generally* HARVEY CORMIER, THE TRUTH IS WHAT WORKS: WILLIAM JAMES, PRAGMATISM, AND THE SEED OF DEATH 25–31 (2001) (discussing how James finds the practical value of truth in its propensity toward making our lives better).

124. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 318. *Accord* WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 344 (1902) (describing beliefs as “rules for action” whose significance lies in their “practical consequences”). *Cf.* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90 (arguing that truth is confirmed in consequences).

125. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 105–06. *Accord* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90 (describing truth in terms of satisfaction).

126. JAMES, PRAGMATISM, *supra* note 21, at 106. *Accord id.* at 111 (“[C]oncrete truths . . . need be recognized only when their recognition is expedient.”); JAMES, THE MEANING OF TRUTH, *supra* note 72, at 127–28 ([I]n the long run the true is the expedient in the way of our thinking. . . .).

127. JAMES, PRAGMATISM, *supra* note 21, at 103. *Accord id.* at 101 (“[T]ruth again is an affair of leading.”); *id.* at 104 (“Our account of truth is an account of truths in the plural, of processes of leading. . . .”).

practical value of true ideas is thus primarily derived from the practical importance of their objects to us.¹²⁸

Pragmatically understood, truth quite profoundly is indeed “an affair of leading.” Truth has “practical value” insofar as it leads us to objects and ideas that hold “practical importance” for our lives.¹²⁹ Truth, writ large, is that which leads us to “*whatever proves itself to be good in the way of belief*.”¹³⁰ True ideas are whatever “*work[s] satisfactorily*”¹³¹ by leading to “*good consequences*.”¹³² The possession of truth, as James put it, is not an end in itself, but an end instrumental—practical and purposive, satisfying and good for human life.

Yet it is crucial to note that the “satisfaction” and “good consequences” here involved are not personal, material, or emotive.¹³³ The satisfaction is *intellectual*; the good consequences are those of beneficial, harmonious interaction with the phenomenal particulars of experiential life.¹³⁴ Propositions are true to the degree they satisfy our vital interest in owning a conception of reality that assembles a set of beliefs that fit together coherently, harmoniously, and with logical consistency.¹³⁵ James stated that:

The “satisfaction” . . . is no abstract satisfaction *überhaupt*, felt by an unspecified being, but . . . such satisfactions (in the plural) as concretely existing men actually do find in their beliefs. . . . [W]e find that to believe in other men’s minds, in independent physical realities, in past events, in eternal logical relations, is satisfactory. We find hope satisfactory. We often find it satisfactory to cease to doubt. Above all we find *consistency* satisfactory, consistency between the present idea and the entire rest of our mental equipment, including the whole order of our sensations, and that of

128. *Id.* at 98.

129. See, e.g., JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE, *supra* note 124, at 344 (“Beliefs, in short, are rules for action. . . . If there were any part of a thought that made no difference in the thought’s practical consequences, then that part would be no proper element of the thought’s significance.”).

130. JAMES, PRAGMATISM, *supra* note 21, at 42. Accord DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 318 (“[O]ur duty to pursue ‘truth’ is conditioned upon its leading to objects which upon the whole are valuable.”).

131. JAMES, PRAGMATISM, *supra* note 21, at 120.

132. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 319.

133. See DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90.

134. *Id.*

135. See PUTNAM, REASON, TRUTH AND HISTORY, *supra* note 99, at 134 (“[W]e are trying to . . . construct a representation of the world which has the characteristics of being instrumentally efficacious, coherent, comprehensive, and functionally simple.”).

our intuitions of likeness and difference, and our whole stock of previously acquired truths.¹³⁶

When it comes to truth, pragmatism thus sees “[t]he trail of the human serpent . . . over everything.”¹³⁷ Reflective knowing as a search for truth is a practical undertaking because how we perceive, interpret, classify, and order the external world depends upon our specifically human interests and purposes.¹³⁸ Truth satisfies insofar as it *works* toward accommodating those purposes and interests.¹³⁹ Given that the outside world is often menacing, presenting us with objects we did not make and laws of nature we cannot avoid, we strive for truth not casually with hollow indifference, but so as to settle questions that meaningfully impact our lives and future conduct.¹⁴⁰ Possessing a coherent, consistent set of true beliefs “is instrumental to gaining control in a troubled situation.”¹⁴¹ Holding fast to a conceptual system that comprehensively encases reality “is instrumental to a control of the environment.”¹⁴² Truth, instrumentally speaking, thus exerts great “practical . . . force.”¹⁴³

To regard truth as instrumental and practical in this sense is not to suggest, however, that reality is whatever we fancy. While pragmatism posits reality *as we conceive it* to be a product of our own human creation,

136. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 104–05. *Accord id.* at 58 (“[I]ntellectual satisfaction [involves] . . . matters of *consistency*— . . . of actually felt consistency among judgments, objects, and habits of reacting, in the mind’s own experienceable world.”); PRAGMATISM, *supra* note 21, at 104 (“Truth in science is what gives us the maximum possible sum of satisfactions, taste included, but consistency both with previous truth and with novel fact is always the most imperious claimant.”).

137. JAMES, PRAGMATISM, *supra* note 21, at 37.

138. *See* DEWEY, THE QUEST FOR CERTAINTY, *supra* note 73, at 39 (“If we had no desires and no purposes, then, . . . one state of things would be as good as any other.”); JAMES, PRAGMATISM, *supra* note 21, at 117 (“Human motives sharpen all our questions, human satisfactions lurk in all our answers, all our formulas have a human twist.”); *id.* at 122 (“[W]e carve out everything, just as we carve out constellations, to suit our human purposes.”).

139. *See, e.g.,* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90–91; JAMES, THE MEANING OF TRUTH, *supra* note 72, at 131; PUTNAM, PRAGMATISM: AN OPEN QUESTION, *supra* note 123, at 73.

140. *See, e.g.,* DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 30 (“[I]ntelligence is not an otiose affair, nor yet a mere preliminary to a spectator-like apprehension of terms and propositions.”).

141. *Id.* at 17.

142. *Id.* at 30. *Accord id.* at 332 (“A knowing as an act is instrumental to the resultant controlled and more significant situation.”); DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90 (“[I]deas, meanings, conceptions, notions, theories, and systems are instrumental to an active reorganization of the given environment, to a removal of some specific trouble and perplexity. . . .”); PUTNAM, PRAGMATISM: AN OPEN QUESTION, *supra* note 123, at 70 (describing pragmatist inquiry as goal-directed toward “cooperative human interaction with an environment”).

143. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 17.

it further assumes there to be a “standing reality independent of the idea that knows it,”¹⁴⁴ such that our conception of reality reflects “discovered facts”¹⁴⁵ which are “*found*, not manufactured.”¹⁴⁶ The control we try to garner over the outside world through rational inquiry and concept formation is thus highly purposive and practical, directed toward ourselves, not the objects we experience and posit as real. The purpose behind striving for knowledge is to adopt “standpoints, attitudes, and methods of behaving toward facts”¹⁴⁷ that will help us develop the “practical . . . future responses which an object requires of us or commits us to.”¹⁴⁸ As James put it, “[t]hose thoughts are true which guide us to *beneficial interaction* with sensible particulars *as they occur*.”¹⁴⁹ The instrumental value of truth, that is, arises from how effectively our ideas, concepts, and beliefs lead us to beneficial consequences in the practical circumstances of daily life.

D. Workability and the Evolutionary Growth of Knowledge

Corollary to the first three tendencies—non-absolutism, radical empiricism, and instrumentalism—pragmatism adopts an evolutionary stance toward knowledge and truth. Far from fixed and absolute for all time, our conceptions of reality are ever “*still in the making*.”¹⁵⁰ Everything we posit about reality is true only provisionally, subject to correction and revision on the basis of further experience and inquiry.¹⁵¹ The experiential flux is unremitting in presenting us with new facts and

144. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 88. *See also id.* at 117 (“[The] notion of a reality independent of . . . us . . . lies at the base of the pragmatist definition of truth.”); JAMES, PRAGMATISM, *supra* note 21, at 111 (suggesting that we have a “duty to agree with reality,” a duty “seen to be grounded in a perfect jungle of concrete expediencies”); DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 237 (“[W]hat makes a man’s idea of his environment true is its agreement with the actual environment . . .”). While pragmatism accepts a standing reality independent of our thoughts, it insists that we can never have knowledge of that reality apart from our ideas of it. How we conceive it depends on the interests, problems, and purposes that stimulate our perception and reflection. Hence, while according to pragmatism reality exists independently of us, nothing is ever true in a purely objective sense. *See* JAMES, PRAGMATISM, *supra* note 21, at 37.

145. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 43 (“[T]he brute objective facts of scientific discovery are discovered facts.”). *Cf. id.* at 55 (“[A]ll meanings are derived from things which antedate suggestion—or thinking or ‘consciousness . . .’”).

146. JAMES, PRAGMATISM, *supra* note 21, at 117.

147. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 332.

148. *Id.* at 309 (emphasis omitted). *Cf.* DEWEY, THE QUEST FOR CERTAINTY, *supra* note 73, at 39 (“Such considerations point to the conclusion that the ultimate ground of the quest for cognitive certainty is the need for security in the results of action.”).

149. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 51 (emphasis in original and added).

150. JAMES, PRAGMATISM, *supra* note 21, at 123 (emphasis added).

151. *See, e.g., id.* at 81, 108; PUTNAM, REASON, TRUTH AND HISTORY, *supra* note 99, at 134–35.

information to fit and assimilate into the general stock of truths that form our conceptions of reality. Matters of questionable fit that defy assimilation stimulate further inquiry and investigation, providing opportunities for the growth of more coherent, workable, and satisfying systems of belief.

Reality and truth thus grow and evolve, according to pragmatism, ever toward greater coherence, consistency, and comprehensiveness. This holds true for all aspects of reality. Our systems of belief undergo agitation, revision, even wholesale realignment in the conceptual realm just as in the domain of the physical concrete particulars we cull from the flux of experience. Not infrequently we articulate new concepts while modifying, amending, or discarding the old, always with a view toward framing more workable conceptual structures. Quite simply, say the pragmatists, in the realm of concepts and ideas “no point of view can ever be *the* last one.”¹⁵²

Conceptual growth and change always begins, on the pragmatist account, when some part of our set of previously accepted beliefs comes under challenge. The challenge may be factual (encountering facts inconsistent with our beliefs), social (meeting people who reject them), or logical (recognizing logical incoherence or contradictions within our belief set). When such challenges arise, they stimulate, in James’s language, “an inward trouble to which [our] mind till then had been a stranger. . . .”¹⁵³ Such inward trouble—doubt or uncertainty—necessitates the reconsideration of our set of conceptual beliefs.¹⁵⁴ Yet pragmatists caution that reconsideration seldom leads to wholesale revision. For when compelled to reexamine our concepts, ideas, or opinions, “we are all extreme conservatives.”¹⁵⁵ The “first principle” in the process of conceptual reformulation is loyalty to our collection of previously accepted beliefs and concepts; indeed, James insisted that “in most cases it is the only principle.”¹⁵⁶ Under most circumstances, we are so committed to our conceptual *status quo* that our response to challenges that would require serious readjustment of our previous beliefs “is to ignore them altogether, or to abuse those who bear witness for them.”¹⁵⁷

Only when neither avoidance nor abuse is possible do we submit to conceptual rearrangement. Even then, the new ideas or concepts we are

152. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 55.

153. JAMES, PRAGMATISM, *supra* note 21, at 35.

154. See DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 199 (“Deliberation has its beginning in troubled activity.”).

155. JAMES, PRAGMATISM, *supra* note 21, at 35.

156. *Id.*

157. *Id.*

most likely to entertain are those that we “can graft upon the ancient stock [of truths] with a minimum of disturbance.”¹⁵⁸ New ideas thus assume a mediative role. We formulate them so far as possible as workable postulates that reconcile satisfactorily the new truth and the ancient stock. A new idea or concept “makes itself true,” James argued, “by the way it works; grafting itself then upon the ancient body of truth, which thus grows.”¹⁵⁹ He continued:

[A] new idea . . . adopted as . . . true . . . preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty, but conceiving that in ways as familiar as the case leaves possible. . . . The most violent revolutions in an individual’s beliefs leave most of his old order standing. . . . New truth is always a go-between, a smoother-over of transitions. It marries old opinion to new fact so as ever to show a minimum of jolt, a maximum of continuity. . . . But success in solving this problem is eminently a matter of approximation. We say this theory solves it on the whole more satisfactorily than that theory; but that means more satisfactorily to ourselves, and individuals will emphasize their points of satisfaction differently.¹⁶⁰

New concepts and ideas thus come to be regarded as true, pragmatically speaking, to the extent they satisfactorily fuse fresh experience or ways of seeing onto the previous stock of our beliefs. To established truths we hold tight. When conceptual reformulation cannot be avoided, we endeavor to assimilate the new and the old, with “a minimum of jolt, a maximum of continuity.” Yet any jolt disrupts continuity. Every conceptual reformulation entails change. Thus, the process of concept formation and reformation, pragmatically understood, binds the two ends of the pragmatic method: its non-absolutist tendency with its insistence that truth grows. Concepts and ideas are never fixed, absolute, and settled for all time, but are dynamic, growing, and evolving interpretations of life, ever *in the making*.

158. *Id.*

159. *Id.* at 36.

160. *Id.* at 35.

IV. RESULT-ORIENTATION AND UTILITARIAN JURISPRUDENCE

A. *The Charge Against Legal Pragmatism*

It is against the backdrop of these themes—non-absolutism, radical empiricism, instrumentalism, and workability and the evolutionary growth of knowledge—that inquiry into whether pragmatism presents a result-oriented methodology should proceed. The assumption made by many legal scholars that it is result-oriented, at least as applied to law, comes from two directions.

First, several prominent legal theorists criticize legal pragmatism for its alleged lack of theoretic integrity. Luban, as noted earlier,¹⁶¹ argues that the pragmatist perceives no inherent value in well-reasoned, consistent legal doctrine but will favor nearly anything in judicial decisionmaking that appears instrumental to achieving outcomes conducive to the “well-being of the community.”¹⁶² Dworkin likewise sees pragmatism as a disturbing approach to law that encourages judges to decide cases according to whatever they deem “best for the community’s future with no regard for past practice as such.”¹⁶³ Morgan Cloud agrees. Pragmatism, he contends, admonishes judges to “base decisions on the *consequences*. . . , the result, that is ‘best.’”¹⁶⁴ Given pragmatism’s vague guidance in evaluating outcomes, Cloud worries that it “leaves judges adrift in individual cases . . . to make ad hoc decisions based upon their subjective beliefs about social needs.”¹⁶⁵ Brian Tamanaha concurs that pragmatism depreciates the virtues of certainty and predictability in judicial reasoning, thereby threatening to undermine the rule of law.¹⁶⁶ In a similar vein, Anthony E. Cook charges pragmatism with impoverishing normative discourse in law. Cook perceives pragmatism as offering a jurisprudence of doubt¹⁶⁷ that reduces adjudication to a “crude experimentalism,”¹⁶⁸ where determining the “right answer” in cases at law becomes “merely a question of which consequences one finds most desirable.”¹⁶⁹

161. See *supra* text accompanying notes 10–13.

162. Luban, *supra* note 10, at 43.

163. DWORKIN, JUSTICE IN ROBES, *supra* note 6, at 21. Accord DWORKIN, LAW’S EMPIRE, *supra* note 4, at 95. See *supra* text accompanying notes 14–18.

164. Cloud, *supra* note 6, at 212–13 (footnote omitted).

165. *Id.* at 214.

166. TAMANAHA, LAW AS A MEANS TO AN END, *supra* note 6, at 129–30.

167. See Cook, *supra* note 5, at 1444.

168. *Id.* at 1445.

169. *Id.* at 1447. For a similar critique, see Morris, *supra* note 4, at 2–5, 12–17.

Theoretical crudity, however, does not besmirch legal pragmatism in the eyes of all who see it as a result-oriented jurisprudence. A second group of legal scholars favors or tries to appropriate legal pragmatism precisely because of its supposed consequentialist leanings. Most prominent among these scholars is Richard Posner. For Judge Posner, pragmatism offers a “forward-looking”¹⁷⁰ approach to adjudication centered on the pithy criterion that judges should strive to craft “the most reasonable decision” under the circumstances.¹⁷¹ By the term forward-looking Posner means that pragmatism focuses judicial decision-making on the present and future, with no obligation to abide by past decisions or previously settled rules.¹⁷² He insists that such an approach is not consequentialist in the sense of being tied to a consequential norm like the principle of utility.¹⁷³ Still, Posner embraces pragmatism under a robustly result-oriented understanding.¹⁷⁴ He celebrates pragmatic adjudication because he sees it foremost as a method that comprehends the end of judging as achieving the “best results.”¹⁷⁵

While Posner is the most prominent proponent, he is not alone in favoring legal pragmatism under the belief that it comprises a result-

170. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 60, 71–73; POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 252–53, 261; POSNER, OVERCOMING LAW, *supra* note 20, at 11.

171. POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 64, 337. *Accord id.* at 73 (“[T]he judge should try to make the decision that is reasonable in the circumstances, all things considered.”) (internal quotations omitted).

172. *See, e.g.*, POSNER, HOW JUDGES THINK, *supra* note 20, at 40, 247–48; POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 71, 253; POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 241–42.

173. *E.g.*, POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 59–60, 65–71, 78, 337. *But see* POSNER, HOW JUDGES THINK, *supra* note 20, at 40 (“Pragmatism bears a family resemblance to utilitarianism . . .”); *id.* at 80–81, 254 (likening pragmatism to rule-utilitarianism).

174. *See, e.g.*, POSNER, HOW JUDGES THINK, *supra* note 20, at 40 (describing his “pragmatic theory of judicial behavior” as one of “basing judgments (legal or otherwise) on consequences . . .”); *id.* at 238 (“The core of legal pragmatism is . . . heightened judicial concern for consequences”); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 82 (“The pragmatic approach permits the judge to pry open the closed area, . . . somewhat unsettling the law in order to achieve some immediate practical goal.”); *id.* at 85 (characterizing the “core of pragmatic adjudication” as “a disposition to ground policy judgments on facts and consequences”) (internal quotations omitted); POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 241 (maintaining that pragmatists evaluate legal systems by the results produced); POSNER, OVERCOMING LAW, *supra* note 20, at 400 (“In approaching . . . interpretation, pragmatists will ask which of the possible resolutions has the best consequences, all things that lawyers are or should be interested in considered . . .”).

175. *E.g.*, POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 241–42, 249, 262, 265. *Accord* POSNER, HOW JUDGES THINK, *supra* note 20, at 40 (“In law, pragmatism refers to basing a judicial decision on the effects the decision is likely to have . . .”); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 82 (“[T]here are few if any cases in which consequential considerations could not possibly be decisive.”).

oriented jurisprudence. Melissa Armstrong follows Posner in analogizing legal pragmatism to rule-utilitarianism.¹⁷⁶ According to Armstrong, so-called “rule pragmatism” provides a “first-order version of pragmatism because the judge has in mind the best possible results when deciding cases.”¹⁷⁷ Daria Roithmayr promotes what she calls “radical pragmatism” because it could “produce a useful outcome” for members of disempowered communities.¹⁷⁸ John O. McGinnis and Michael Rappaport offer what they claim to be a pragmatic argument in favor of originalism in constitutional interpretation.¹⁷⁹ They turn to pragmatism because it allegedly “has the essential virtue of ensuring that the consequences of legal decisions will be good.”¹⁸⁰ Lael Daniel Weinberger, after first shunning pragmatism as an unprincipled, “results-oriented approach” to constitutional interpretation,¹⁸¹ then tries to appropriate it in order to “trick”¹⁸² judges and scholars into a “substantial change in Establishment Clause analysis.”¹⁸³

While these legal scholars call what they criticize or favor “pragmatism,” the result-oriented methodologies they discuss really have little to do with pragmatist philosophy or any fair account of pragmatist jurisprudence. This becomes clear by comparing the method of pragmatism with the mindset of jurisprudential result-orientation. Just as utilitarianism provides a suitable prototype of result-orientation in ethical theory, so too does it provide an apt model for result-oriented legal theory.

B. Utilitarian Jurisprudence

As is well known, Jeremy Bentham designed utilitarianism primarily as a theory of social and legal morality, not one of personal ethics. Most of his major writings, including half of his seminal *The Principles of Morals and Legislation*,¹⁸⁴ address law, especially the contours of constitutional government,¹⁸⁵ and the shape of a just system of criminal punishment.¹⁸⁶

176. Melissa Armstrong, *Rule Pragmatism: Theory and Application to Qualified Immunity Analysis*, 38 COLUM. J.L. & SOC. PROBS. 107, 107–10, 112–14 (2004).

177. *Id.* at 116.

178. Roithmayr, *supra* note 8, at 949.

179. McGinnis & Rappaport, *supra* note 8, at 917.

180. *Id.*

181. Weinberger, *supra* note 19, at 411.

182. *Id.* at 415.

183. *Id.* at 414.

184. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* (1781).

185. See, e.g., JEREMY BENTHAM, *CONSTITUTIONAL CODE* (c. 1830); JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (1776).

186. See BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, *supra* note 184, at 170–336.

For over two centuries now, numerous legal theorists have sought to expand on Bentham's work by developing comprehensive conceptions of law atop a utilitarian foundation. John Austin was the first, weaving a decidedly utilitarian thread into his otherwise anormative jurisprudence of legal positivism.¹⁸⁷ Austin argued that the principle of utility "not only ought to guide, but . . . has usually been the principle consulted in making laws."¹⁸⁸ John Stuart Mill likewise rested his influential defense of liberty and individual freedom on a utilitarian foundation.¹⁸⁹

Paradigmatic and illustrative of the method of utilitarian jurisprudence are the more recent legal philosophies of François GénY and Richard Wasserstrom. GénY was one of the leading exponents of the early twentieth century European free law or free legal decision movement in jurisprudence.¹⁹⁰ He argued that two ideals—*justice* and *social utility*—form the "ultimate standard" for adjudication.¹⁹¹ On his account, judicial decision-making is best understood as free and scientific: "free, because no positive outward authority compels [the judge] to decide as he does; . . . scientific, because it finds its solid foundations in nothing but the objective elements which legal science must reveal to him."¹⁹² In searching for objective elements in, as he put it, "the nature of things,"¹⁹³ GénY identified the "two great guide-posts" of justice and general utility as the factors toward which all law, judicial and legislative, should aim.¹⁹⁴ While he acknowledged that these ideals amount to somewhat "empty forms,"¹⁹⁵ GénY nevertheless insisted that the only sound justification for a legal rule is that it "aims at promoting justice and . . . the welfare of the greater number."¹⁹⁶

The American philosopher Richard Wasserstrom took a similar approach in his 1961 book, *The Judicial Decision: Toward a Theory of Legal Justification*. Wasserstrom there set forth a "'two-level' logic"¹⁹⁷ for

187. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 37–63, 74–118 (Weidenfeld & Nicholson 1954) (1832).

188. *Id.* at 59.

189. See, e.g., JOHN STUART MILL, ON LIBERTY 122–23, 130, 143–44 (Broadview 1999) (1859).

190. See François GénY, *Judicial Freedom of Decision: Its Necessity and Method*, in SCIENCE OF LEGAL METHOD: SELECTED ESSAYS BY VARIOUS AUTHORS 1 (Ernest Bruncken & Layton B. Register trans., 1917). See generally Douglas Lind, *Free Legal Decision and the Interpretive Re-Turn in Modern Legal Theory*, 38 AM. J. JURIS. 159, 176–86 (1993).

191. GénY, *supra* note 175, at 4, 14.

192. *Id.* at 5.

193. *Id.* at 8, 11, 14.

194. *Id.* at 14.

195. *Id.*

196. *Id.* at 4, 14.

197. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL

adjudication centered on a “careful restricted utilitarianism.”¹⁹⁸ He described his “two-level procedure of legal justification”¹⁹⁹ as requiring, first, that “courts are to justify their decisions by appealing to legal rules”²⁰⁰ and, second, that they are to select those rules “by appealing to the principle of utility.”²⁰¹ That is to say, Wasserstrom prescribed a fixed rule of decision for courts where “the legal rule that is to be used to justify the particular decision would itself have to be justified on utilitarian grounds.”²⁰²

To illustrate his two-level procedure, Wasserstrom presented a hypothetical mortgage hardship case.²⁰³ Imagine a filthy rich mortgagor intent on foreclosing and evicting, in the cold of winter, a destitute widow with six children from their old, dilapidated farm. Human sympathy would call for equity to intervene. Wasserstrom disagreed. Arguing against an equitable decision rule that would consider only how the decision would impact the litigants before the court, he insisted, pursuant to the first prong of his two-level procedure, that it be adjudged according to some general legal rule. The challenge for a court considering the widow’s request for forbearance is to craft a “rule of law that effects a balance”²⁰⁴ between the social value of giving special treatment to widows as a class of mortgagees and the considerable social utility of maintaining a viable institution of mortgage lending that engenders trust in mortgagors and mortgagees alike.²⁰⁵ Throughout, the crafting of this decision rule must turn on the second prong, that calling for appeal to the principle of utility.²⁰⁶ Wasserstrom explained:

The practice of deciding particular mortgage cases by considering only the consequences of the decision to the litigants is more likely to result in undesirable consequences of a more serious and far-reaching nature than is the practice of deciding particular cases by

JUSTIFICATION 122 (1961).

198. *Id.* at 138. The two-level restricted utilitarianism Wasserstrom advanced is essentially what is commonly called “rule-utilitarianism.” *See supra* note 31 and accompanying text.

199. WASSERSTROM, *supra* note 197, at 136.

200. *Id.*

201. *Id.*

202. *Id.* at 122.

203. *See id.* at 141–44.

204. WASSERSTROM, *supra* note 197, at 142.

205. *Id.* at 142–43.

206. *See id.* at 142 (“Utilitarian considerations are surely crucial to the formulation of the most desirable rule of mortgage law.”).

an appeal to that legal rule which on utilitarian grounds is deemed most desirable.²⁰⁷

Wasserstrom's theory of judicial decision-making, like that of Gény before him, thus rests squarely on a utilitarian foundation and thereby carries the torch of result-orientation. Each of their theories treats every case at law as having a right outcome determinable by following a formal process hinging on the principle of utility. Each treats that principle as fixed antecedent to judicial deliberation. Their methods, offered as prescriptive accounts for how courts *ought* to decide cases, unequivocally identify the best overall outcome or result as the standard or ultimate criterion of judicial justification. Legal pragmatism is very different.

V. DISTINGUISHING PRAGMATISM AND UTILITARIANISM

A. Instrumentalism as Adaptation and Control

The claim that legal pragmatism amounts to a result-oriented jurisprudence stems, more than anything, from a mistaken understanding of the instrumentalist tenor of pragmatic philosophy. As we have seen, pragmatism's perhaps most "distinguishing trait is that it defines thought or intelligence by function, by work done, by consequences effected."²⁰⁸ That is, pragmatism sees truth as valuable principally in a *functional* or *instrumental* sense—not valuable *per se*, but valuable *in relation to us*.²⁰⁹ "Truth is made . . . [by us] in the course of experience,"²¹⁰ James claimed, and we value it because it is "helpful in life's practical struggles."²¹¹ Reflecting the accumulated experience of the human interface with the external world,²¹² 'truth' is the name we assign to "*whatever proves itself to be good in the way of belief*."²¹³ In James's perhaps unfortunate wording, truth has "cash-value"²¹⁴—i.e., "is profitable to our lives"²¹⁵—a

207. *Id.*

208. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 31.

209. See *id.* at 318; PUTNAM, PRAGMATISM: AN OPEN QUESTION, *supra* note 123, at 73–74; PUTNAM, REASON, TRUTH AND HISTORY, *supra* note 99, at 133–34.

210. JAMES, PRAGMATISM, *supra* note 21, at 104.

211. *Id.* at 42. *Accord id.* at 110 ("Truth makes no other kind of claim and imposes no other kind of ought than health and wealth do. All these claims are conditional . . . [with] concrete benefits. . .").

212. See JOHN DEWEY, EXPERIENCE AND NATURE 435 (2d ed., Dover Pub. 1958) (1929).

213. JAMES, PRAGMATISM, *supra* note 21, at 42.

214. *Id.* at 32, 41.

215. *Id.* at 42. *Accord* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 47 ("[T]he concrete truth for us will always be that way of thinking in which our various experiences most profitably combine.").

position with which Dewey fully concurred, though in less-laden language. In Dewey's terms, the significance we assign to that which we accept as true is, pragmatically speaking, a product of its practical "*value, importance.*"²¹⁶ We do not pursue truth as if it were an idle affair.²¹⁷ Rather, truth matters because knowledge is "involved in the process by which life is sustained and evolved."²¹⁸ Distinguishing truth from falsehood matters because claims and propositions that are true can perform the "active, dynamic function" of guiding us away from "trouble and perplexity" toward the "clearing up of a specific situation."²¹⁹ False claims, to the contrary, fail when put to the test of accomplishing such beneficial work.²²⁰

Now, in this instrumentalist sense, the value pragmatism assigns truth does indeed emphasize consequences. "The true" is any belief or knowledge-claim that, "when given, . . . leads to desirable consequences."²²¹ True ideas or beliefs are those that provide "*satisfaction*"²²² by leading to "*good consequences.*"²²³ In law, "the standard [of judgment] is found in consequences, in the *function* of what goes on socially."²²⁴ Still, this instrumentalist conception of truth does not render pragmatism a result-oriented philosophy. The satisfaction that matters to the pragmatist is in no sense material or preference-based, but intellectual satisfaction—the satisfaction that comes from possessing a set of beliefs that combine to form a coherent, workable, and logically consistent worldview.²²⁵ The good consequences are those that guide us to beneficial and harmonious interaction with the phenomenal particulars, including the social facts, of everyday life.²²⁶

216. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 311.

217. *See id.* at 30.

218. DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 74, at 50.

219. *Id.* at 90.

220. *See id.*

221. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 318. Accord JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 127 ("[W]hen [humans] have true ideas of realities, consequential utilities ensue in abundance. . .").

222. *See* DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 74, at 90; DEWEY, *EXPERIENCE AND NATURE*, *supra* note 212, at 10; JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 104–07, 128–33; JAMES, *PRAGMATISM*, *supra* note 21, at 34–35, 120.

223. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 319.

224. John Dewey, *My Philosophy of Law*, in 14 JOHN DEWEY, *THE LATER WORKS, 1925–1953*, at 115, 122 (S. Ill. Univ. Press 1988) (1941).

225. *See, e.g.*, DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 74, at 90; JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 58, 104–05, 129–33; JAMES, *PRAGMATISM*, *supra* note 21, at 104; PUTNAM, *PRAGMATISM: AN OPEN QUESTION*, *supra* note 123, at 14–16.

226. *See* Dewey, *My Philosophy of Law*, *supra* note 224, at 121–22; JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 38, 51, 53.

From the standpoint of pragmatism, truth is thus instrumental or practical insofar as how we perceive and assimilate the outside world, order and reorder it, is contingent upon the problems, purposes, and interests we have in mind: “[W]e carve out everything, just as we carve out constellations, to suit our human purposes.”²²⁷ Truth satisfies to the extent that it *works* toward meeting those purposes.²²⁸ We are neither indifferent nor disinterested, nor even fully objective, when it comes to truth.²²⁹ We search for truth, for the most part, to gain the repose that accompanies successfully adapting to and attaining a degree of control over the external world. “[R]eflective knowing,” Dewey wrote, “is instrumental to gaining control”²³⁰ over at least some tokens of the myriad objects not of our making and beyond our avoidance that we encounter in our daily forays into that outside world. Concepts and theories that explain and structure the world in a coherent and consistent way are enormously valuable as “mental modes of *adaptation* to reality”²³¹ that prove “instrumental to a control of the environment.”²³² The instrumental cash-value of truth, then, reflects how fruitfully our ideas and beliefs lead us *in practice* to beneficial consequences in this sense of epistemic adaptation and control.

B. The Failed Project of Utilitarianism

Pragmatic consideration of consequences thus involves a very different form of deliberation and judgment than marks the result-oriented appeal to consequences found in utilitarianism. Whether in its classical form as a moral theory or employed, as by Géný and Wasserstrom, as a justificatory standard for judicial decision-making, utilitarianism represents the very type of absolutist reasoning that pragmatism combats. Utilitarians offer up the principle of utility (however conceived)²³³ as the ultimate standard of morality or adjudication. Its supremacy as *the end* of action is fixed antecedent to deliberation in any particular ethical or adjudicative matter. While the specific results of utilitarian deliberation are not foregone, by

227. JAMES, PRAGMATISM, *supra* note 21, at 122.

228. See, e.g., DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 90; JAMES, THE MEANING OF TRUTH, *supra* note 72, at 131.

229. See JAMES, PRAGMATISM, *supra* note 21, at 37.

230. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 17.

231. JAMES, PRAGMATISM, *supra* note 21, at 94.

232. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 30. Accord DEWEY, EXPERIENCE AND NATURE, *supra* note 212, at 10–11; DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 89–90.

233. See *supra* text accompanying notes 25–42.

restricting the range of deliberative criteria to consequences only, utilitarianism does determine antecedently the direction it will lead. Deliberation calls only for deference to the principle of utility, assessing the consequences likely to follow from each alternative course of action, and then selecting, by deductive inference, that action which is expected to result in the best possible overall state of affairs. Non-consequential considerations do not count. Every utilitarian judgment projects the best possible outcome and is justified on the basis of that result-focused projection alone.

To Dewey, the utilitarian method suffers so many inadequacies as to serve as “a remarkable example of the need of philosophic reconstruction.”²³⁴ Though he credited the utilitarians with doing much to advance normative thought beyond the medieval shackles of otherworldly authority, he regretted their failure to free it from the orthodoxy of absolutism.²³⁵ Utilitarianism was to him a “reform movement”²³⁶ founded on the “just insight” that moral goodness begins and ends with humanity and the welfare of society.²³⁷ Yet by positing the principle of utility as the one “fixed, final and supreme end” of moral inquiry, the utilitarians merely followed, in unquestioning imitation, the timeworn method of philosophical absolutism.²³⁸ The result was “catastrophe.”²³⁹ For the utilitarian method of defining the good in terms of future pleasures or satisfactions and restricting moral deliberation to an algebraic calculation produces an impossible standard of right conduct that only confuses and obscures normative inquiry.²⁴⁰ To Dewey, the hedonic ends of utilitarianism—pleasure, happiness, preference-satisfaction—are “among the things most elusive of calculation.”²⁴¹ Despite the claims of the utilitarians to the contrary, those ends are incapable of commensurate quantification.²⁴² Projecting them into an unknown future only enhances the indeterminacy.²⁴³ Hence, though he lauded utilitarianism for concentrating moral inquiry on social well-being, Dewey castigated it for

234. DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 105.

235. *See id.* at 104; DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 211–13.

236. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 205.

237. *Id.* at 212. *Accord* DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 104.

238. DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 74, at 104.

239. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 212.

240. *See, e.g., id.* at 202–04, 207–08, 221. *See generally* ABRAHAM EDEL, ETHICAL THEORY AND SOCIAL CHANGE: THE EVOLUTION OF JOHN DEWEY’S ETHICS, 1908–1932, at 23–24 (2001) (discussing Dewey’s criticism of the utilitarian method).

241. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 203.

242. *See id.* at 215–16.

243. *See id.* at 203.

reducing ethics to an unsightly choice “between a sickly introspection and an intricate calculus of remote, inaccessible and indeterminate results.”²⁴⁴

Yet even more troubling to Dewey than utilitarianism’s impractical calculus is its mistaken conception of thought and deliberation. On his account, the utilitarians paradoxically over-stated the role of reason and rationality in human conduct while at the same time diminishing the robustness of deliberation by reducing all judgment of action to a simplified calculation of quantities.²⁴⁵ This was to Dewey to confound the functional purpose of deliberation.²⁴⁶ For we neither act from reason nor reason only to calculate profits and losses, as if the whole purpose and value of human life could be accounted for on a business ledger.²⁴⁷ Rather, reason intersects with action insofar as it serves as a tool for appraising present possible courses of conduct.²⁴⁸ Deliberation begins in uncertainty and confusion over how to respond in a troublesome situation.²⁴⁹ Its purpose “is to resolve entanglements in existing activity, restore continuity, recover harmony, utilize loose impulse, and redirect habit.”²⁵⁰ We deliberate—inquire into facts and circumstances, assess habits and desires, ponder available courses of action—so as to achieve the instrumental ends of disentangling, re-harmonizing,²⁵¹ and gaining “control of environment in relation to the ends of the life process.”²⁵² It is an exercise in search, experiment, and discovery.²⁵³ Most often it leads to judgments that are tentative and provisional, no more than working hypotheses.²⁵⁴ Never can we hope to deliberate to the end of inquiry nor settle upon, once and for all, *the* final end. For to encounter new facts and situations, to suffer unexpected challenges, and to stumble and fall from certainty is the destiny of humanity. The fashioning of ends is endless.²⁵⁵ Deliberation is continuous: “Even the most comprehensive deliberation leading to the most momentous choice only fixes a disposition which has to be continuously applied in new and unforeseen conditions, re-adapted

244. *Id.* at 202.

245. *See id.* at 200, 218, 221.

246. *See id.* at 218.

247. *See, e.g.*, DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 199–201, 213–15, 218–21.

248. *See id.* at 206–07.

249. *See id.* at 199, 207.

250. *Id.* at 199.

251. *See id.* at 199, 231.

252. John Dewey, *Interpretation of Savage Mind*, in 2 JOHN DEWEY: THE MIDDLE WORKS, 1899–1924, at 41 (Jo Ann Boydston ed., 1976) (1902).

253. *See* DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 208, 216.

254. *See id.* at 56, 202, 208, 215; Dewey, *Logical Method and Law*, *supra* note 76, at 26.

255. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 74, at 232.

by future deliberations.”²⁵⁶ Reason thus helps keep activity vital and growing in depth of meaning and significance.²⁵⁷ It encourages imaginative foresight of consequences brought into view as workable solutions to troubled situations.²⁵⁸ In no respect, insisted Dewey, can this robust process of inquiry, deliberation, and judgment be reduced to a shallow calculative prediction of future consequences.²⁵⁹

Utilitarianism and pragmatism thus align only superficially. They share an interest in humanity, manifested in conceptions of truth and goodness that reference human purposes and social welfare. They each speak in terms of good consequences and satisfaction. Yet it is fallacious to assume that their common use of the terms “social welfare,” “consequences,” and “satisfaction” means that they use those terms in a common way. It was Ludwig Wittgenstein who most poignantly revealed how frequently misunderstandings result from the common tendency to assimilate from one linguistic context to another words and expressions that serve very different functions within each.²⁶⁰ That tendency accounts, at least in part, for the misunderstanding that pragmatism is result-oriented. Legal theorists often blend pragmatism with utilitarianism for no reason other than the linguistic fact that they both reference consequences, satisfactions, and other like terms.²⁶¹ Yet there is no justification for assuming, as to any pair of theoretical structures, that common expressions entail the same conceptual framework. As we have seen, for utilitarianism and pragmatism, the functions their shared words serve are in no way comparable.

C. The Confluence of Practice and Consequences

By all accounts, utilitarianism is result-oriented. It directs all human conduct toward those particular results that maximize the overall social

256. *Id.* at 208.

257. *See id.*

258. *See id.* at 208, 215.

259. *See, e.g., id.* at 205–06.

260. *See, e.g.,* WITTGENSTEIN’S LECTURES, CAMBRIDGE, 1932–1935, at 102–04 (Alice Ambrose ed., 2001); WITTGENSTEIN’S LECTURES ON THE FOUNDATIONS OF MATHEMATICS, CAMBRIDGE, 1939 FROM THE NOTES OF R.G. BOSANQUET, NORMAN MALCOM, RUSH RHEES, AND YORICK SMYTHIES 14 (Cora Diamond ed., 1975).

261. *See, e.g.,* DWORKIN, JUSTICE IN ROBES, *supra* note 6, at 21, 24; Armstrong, *supra* note 176, at 109–14; Shalin, *supra* note 4, at 458, 462. *Cf.* Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2091–95 (1996) (discussing the relationship of pragmatism and utilitarianism).

good.²⁶² Very different is the consequential “*good in the way of belief*”²⁶³ toward which pragmatism aims. It is not a formulaic, measurable good that calls for—or even permits—evaluative comparison of courses of action or sets of beliefs under the floodlight of a fixed antecedent end. Rather, it is a *process* or *practice* good, a way of mediating between and evaluating the practical worth of particular knowledge-claims or judgments and, more generally, of theories of knowledge or truth. In James’s terms, “pragmatism [is] a mediator and reconciler . . . that . . . ‘unstiffens’ our theories. She has in fact no prejudices whatever, no obstructive dogmas, no rigid canons of what shall count as proof. She is completely genial. She will entertain any hypothesis, she will consider any evidence.”²⁶⁴ Rather than prescribing a formal method of inquiry testable by the results it reaches, pragmatism assumes “an attitude of orientation,” specifically “[t]he attitude of looking away from first things, principles, ‘categories,’ supposed necessities; and of looking towards last things, fruits, consequences, facts.”²⁶⁵ The question pragmatism ever asks is what practical difference to human life does it make to adopt one or another theory, meaning, or truth. This question goes to “last things”: fruits, consequences, and concrete facts. Yet it is not a question that finds a particular result fruitful or a certain consequence good because they satisfy some pre-conceived standard of value or goodness. The pragmatic method endorses “[n]o particular results”²⁶⁶ but only those outcomes that prove beneficial and workable in the full context of belief.

Illustrative of pragmatism’s non-dogmatic attitude or “way of looking” is Dewey’s critical appraisal of traditional metaphysics. Metaphysical theories typically provide non-historical, causally-based accounts of reality. To Dewey, such accounts tend to be unhelpful in that they offer little in the way of practical guidance for actually living within the realities supposedly revealed. Competing metaphysics often provide nothing more than conflicting statements about reality that are “equally true descriptively; [even though] neither statement is true in the explanatory and metaphysical meaning imputed to it.”²⁶⁷ Early in the twentieth century, one such idle metaphysical debate addressed the developmental essence of human personality and character. The question was whether the

262. See *supra* text accompanying notes 25–42.

263. JAMES, PRAGMATISM, *supra* note 21, at 42.

264. *Id.* at 43–44.

265. *Id.* at 32.

266. *Id.*

267. DEWEY, EXPERIENCE AND NATURE, *supra* note 212, at 273.

adult personality is caused by forces and patterns established in childhood, or whether childhood is a mere prefatory step leading to adulthood, conceived as an end already implicitly determined prior to the journey of youth. On Dewey's account, such metaphysical debate errs because it assumes reality can be explained by "breaking up . . . a continuity of historical change into separate parts."²⁶⁸ To pragmatists, such atomistic thinking only confounds understanding, for reality is not comprised of a static accumulation of ahistorical isolated elements or events. Rather, as Dewey put it:

The reality *is* the growth-process itself; childhood and adulthood are phases of a continuity, in which just because it is a history, the later cannot exist until the earlier exists. . . ; and in which the later makes use of the registered and cumulative outcome of the earlier The real existence is the history in its entirety, the history as just what it is. The operations of splitting it up into two parts and then having to unite them again by appeal to causative power are equally arbitrary and gratuitous. Childhood is the childhood *of* and *in* a certain serial process of changes which is just what it is, and so is maturity.²⁶⁹

Reality, that is, is always "*in the making*"²⁷⁰ and must be understood in practice, i.e., in the whole context of its historical development. So too must truth. The true holds instrumental ("cash") value; yet the desirable consequences that accompany it and the satisfaction to which it gives rise cannot be understood by looking only at the end-point (the *result*) of inquiry as marked by the judgment of truth. Rather, like reality, truth "*is [a] growth-process itself,*" such that "the real [truth] is the history [of inquiry and deliberation] in its entirety, the history as just what it is."²⁷¹ Focusing consequentially only on the "function of [deliberation as] giving a result, and not in its character of being a process"²⁷² masks and obscures the "phases of a continuity" through which knowledge grows.²⁷³ Moreover, it clouds our understanding and depreciates the significance of the many intermediate truths that span those phases. As stated by James, "[t]he bridge of intermediaries, actual or possible, which in every real case

268. *Id.* at 275.

269. *Id.*

270. JAMES, PRAGMATISM, *supra* note 21, at 123.

271. DEWEY, EXPERIENCE AND NATURE, *supra* note 212, at 275.

272. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 81.

273. DEWEY, EXPERIENCE AND NATURE, *supra* note 212, at 275.

is what carries and defines the knowing, gets treated as an episodic complication which need not even potentially be there.”²⁷⁴

By the pragmatic method, however, both the phases of our knowing and the truths intermediate to the end-result receive their due regard. For to pragmatism, truth encompasses the whole practice of inquiry, the full history of “our minds and our experiences work[ing] . . . together.”²⁷⁵ Only by taking account of all phases, of all facts and circumstances, of all inferences and observations redounding across that whole continuum of mind and experience can we attain *the true end-result of inquiry*: the creation of “a system—a comprehensive and orderly arrangement”²⁷⁶ of ideas and beliefs that lead us *in practice* to “desirable consequences.”²⁷⁷

Yet once again, from the standpoint of pragmatism, those consequences that are desirable are not those that conform with a ready-made teleological standard. For pragmatism “is a method only.”²⁷⁸ It “stands for no particular results.”²⁷⁹ It advances “no dogmas, and no doctrines save its method.”²⁸⁰ The only conclusions it endorses are those affirmed by mind and experience working together as likely to “lead” to beneficial outcomes,²⁸¹ by providing some degree of control and enhancing our ability to adapt and navigate through the alternatively useful and harmful, protective and hostile, reaffirming and challenging world of external objects and others that we encounter daily. Truth provides *satisfaction* insofar as it *works* toward articulating coherent and usable systems of belief that, in this practice-oriented sense of control and navigation, “suit our human purposes.”²⁸² Here lies the “practical value” and consequential significance of truth.²⁸³ And here lies likewise the practical value and consequential orientation of the pragmatic method.

Thus to say, from the standpoint of pragmatism, that truth is “*whatever proves itself to be good in the way of belief*,”²⁸⁴ that true ideas are those

274. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 82.

275. JAMES, PRAGMATISM, *supra* note 21, at 40.

276. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 55.

277. *Id.* at 318.

278. JAMES, PRAGMATISM, *supra* note 21, at 31. *Accord* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 37 (“[Pragmatism] only . . . indicate[s] a method of carrying on abstract discussion.”).

279. JAMES, PRAGMATISM, *supra* note 21, at 32. *Accord id.* at 31 (“[Pragmatism] does not stand for any special results.”).

280. *Id.*

281. *Id.* at 103.

282. *Id.* at 122. *Accord* JAMES, THE MEANING OF TRUTH, *supra* note 72, at 131.

283. JAMES, PRAGMATISM, *supra* note 21, at 98.

284. *Id.* at 42.

that “*work satisfactorily*”²⁸⁵ by leading to “*good consequences*”²⁸⁶ is to say only that true belief matters *practically* for the convenience, comfort, and security of human life. We are ever carving constellations,²⁸⁷ engrafting meaning, sense, and significance on realities found in the flux of experience. Truth is thus largely of our own making and plural. Yet not all belief systems are equal. The same reality can be accounted for differently—can be carved into various constellations. Those accounts that provide the most useful and coherent descriptive accounts of the found realities, i.e., those that lead to the good consequences of greater control, readier adaptation, and easier navigation, are those with the most value relative to our human purposes. It is those accounts we hold to be true:

Ideas that tell us which [external objects or conditions] to expect count as the true ideas in all this primary sphere of verification, and the pursuit of such ideas is a primary human duty. . . . If I am lost in the woods and starved, and find what looks like a cow-path, it is of the utmost importance that I should think of a human habitation at the end of it, for if I do so and follow it, I save myself. . . . The practical value of true ideas is thus primarily derived from the practical importance of their objects to us.²⁸⁸

To pragmatism, truth is plural, but not relative; satisfying, though not subjective; purposive, not personal; consequential, not teleological; practice-oriented, never result-oriented. The outside world indulges our concept formation and truth-making with great tolerance. But only at risk of adverse consequences do we hold fast in practice to truths that ill-fit the concrete particulars that we confront in the external world. “Experience . . . has ways of *boiling over*, and making us correct our present formulas.”²⁸⁹ For that reason, how we search for truth and deliberate toward ends is consequential, since forming true beliefs can keep us from being scalded.

285. *Id.* at 120.

286. DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC*, *supra* note 22, at 319.

287. *See* JAMES, *PRAGMATISM*, *supra* note 21, at 122.

288. *Id.* at 98.

289. *Id.* at 106.

VI. BENJAMIN CARDOZO AND THE PRAGMATIC PRACTICE OF COMMON LAW ADJUDICATION

No better paradigm of pragmatism's robust instrumental process exists than that of the common law method of adjudication. Pragmatist thinking began to influence American law and jurisprudence in the late nineteenth and early twentieth centuries concurrent with its development as a recognized philosophic method. A young Oliver Wendell Holmes, Jr., chummed with William James and C. S. Pierce, another of pragmatism's founders, in the early 1870s.²⁹⁰ Nicholas St. John Green, a notable scholar of tort law, introduced elements of pragmatist thought into the law by way of his writings on negligence.²⁹¹ As early as 1909, a widely circulated series of lectures on jurisprudence described the development of legal principle to a generation of young lawyers in clear pragmatist fashion.²⁹²

The most elegant and complete pragmatist account of common law adjudication came from Benjamin Cardozo. In his Yale Tanner Lectures, published in 1921 as *The Nature of the Judicial Process*, Justice Cardozo straightforwardly embraced pragmatist thought, declaring that the "juristic philosophy of the common law is at bottom the philosophy of pragmatism."²⁹³ He reaffirmed this commitment in *The Growth of the Law*.²⁹⁴ There he argued that pragmatism was "profoundly affecting the development of juristic thought."²⁹⁵ No jurist since has matched Cardozo's clarity in presenting a pragmatist account of adjudication. A quick review of his work reveals the instrumentalist tenor of the common law method while countering the claim that legal pragmatism provides a result-oriented jurisprudence.

A. *Legal Rules as Working Hypotheses, Not Absolute Postulates*

To Justice Cardozo, common law adjudication, like the philosophy of pragmatism, assumes a humble vision of legal truth. Just as pragmatist

290. See LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 201–05 (2001).

291. See, e.g., Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870), reprinted in 5 KAN. CITY L. REV. 114 (1936).

292. See MUNROE SMITH, *JURISPRUDENCE* (1909).

293. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 102 (1921) (footnote omitted).

294. See BENJAMIN NATHAN CARDOZO, *THE GROWTH OF THE LAW*, reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 185 (Margaret E. Hall ed., Fallon Pub. 1947) (1924).

295. *Id.* at 242. *Cf. id.* at 205 ("Pragmatism is at least a working rule by which [legal] truth is to be tested, and its attainment known.") (footnote omitted).

philosophy rejects absolutism, Cardozo repudiated the idea that legal rules and principles represent “absolute”²⁹⁶ or “final truths”²⁹⁷ ready to be plucked by judges “full-blossomed from the trees.”²⁹⁸ Common law adjudication, he wrote, “does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively.”²⁹⁹ Rather, the process of common law inquiry is foremost an empirical one; its method of reasoning is mainly inductive.³⁰⁰ Rules and principles emerge organically in the fundamentally pragmatic process of case-by-case decision-making. That process depends heavily on experience and requires judges to assume an “experimental” mindset.³⁰¹ Reminiscent of Dewey,³⁰² Cardozo maintained that the rules and principles there derived amount to nothing more than “working hypotheses.”³⁰³ Each new case with its distinct facts and concrete circumstances presents a new experiment against which the hypotheses are tested and reconsidered. In this manner, the empirical data of the law—the rules and principles crafted in past decisions and stored in the law’s “great laboratories” of precedent and doctrine—are “continuously retested.”³⁰⁴ The rules and principles that work well by contributing coherently and efficiently to the welfare of society become reinforced and affirmed.³⁰⁵ Those that “do not work well,” that “work injustice,” are re-examined and potentially nullified and abandoned.³⁰⁶

This experimental picture of the common law method fully comports with the philosophy of pragmatism. So does Justice Cardozo’s insistence that common law judges cannot re-examine, abandon, modify, or create new rules or doctrines at will.³⁰⁷ Pragmatist philosophy limits the adoption

296. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 102. Cf. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 205 (stating that reality, insofar as we can know it, is conditioned and relative, not “absolute and unconditioned”).

297. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 23. *Accord id.* at 161 (arguing that legal truths are “less preordained and constant” than generally assumed).

298. MUNROE SMITH, JURISPRUDENCE (1909), *quoted in* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 103.

299. *Id.* at 22.

300. *See id.* at 23.

301. *Id.* at 23.

302. *See supra* notes 76–77 and accompanying text.

303. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 23; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 218. *Accord id.* at 208 (“tentative hypothesis”); *id.* at 216 (“provisional hypotheses”).

304. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 23.

305. *See id.* at 66–67, 73.

306. MUNROE SMITH, JURISPRUDENCE (1909), *quoted in* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 23.

307. *See id.* at 103–15, 129–41; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 204,

or rejection of beliefs to their rational fit and functional coherence within an overall practice or system of belief. Likewise, the power of common law adjudication is a power restrained by system and tradition, regulated by reason, and responsible to function.³⁰⁸ Cardozo observed that judges “must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations.”³⁰⁹ No judge enjoys the right or power “to travel beyond the walls of the interstices.”³¹⁰

Common law adjudication no more than the philosophy of pragmatism thus warrants the label of result-orientation. Pragmatism disavows as unjustified any belief that contravenes the empirical data of its origin or ill-fits the system of belief that serves as its destination. Common law judges work within precisely such a practice beholden to empirical fidelity and systematic coherence. Judges must confine their outcome-preferences and innovative skills within the interstitial walls of precedent and practice erected over centuries of common law practice. Still, Cardozo insisted that those interstitial walls do not harbor absolute legal truths immune to challenge or beyond rebuttal. They are the laboratory walls. The truths they hold within are the working hypotheses of legal rules and principles. Precedent and practice accordingly do not hand judges sparkling formulas for easy determination of outcomes. Rather, the walls of precedent and practice determine only the range of judicial discretion, the space of intellectual inquiry “over which [judicial] choice moves.”³¹¹ Most often that range is nil.³¹² Most cases are commonplace. They fit clearly and unambiguously within settled doctrines of law. Yet a minority of cases fall into gaps or unsettled areas of law. Others raise factual questions that go beyond the settled extension of the applicable rule of law. These cases, where the legal belief-set is indeterminate,³¹³ comprise the small

227–28.

308. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 30–31, 112, 141; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 206–08, 220–21, 229–33.

309. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 103.

310. *Id.* at 129. *Accord id.* at 114 (arguing that judges may not go about “traveling beyond the walls of the interstices”).

311. *Id.* at 103.

312. See *id.* at 129 (“In countless litigations, the law is so clear that judges have no discretion.”). *Accord id.* at 164 (noting that the majority of cases are “predestined” in the sense that they “could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain.”).

313. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 21.

percentage of cases that require the “creative element” of judging³¹⁴—the exercise of choice within the walls of practice.³¹⁵

B. Fitness to the End of Social Justice

Cardozo thus perceived the creative element in adjudication as arising only in a special and narrow phase of judicial practice. It was a phase that he went on to describe in markedly pragmatist and instrumental terms. The pragmatist philosophers, as we have seen, stressed the functional nature of inquiry and truth. James argued that the standard for true belief is found in the “concrete benefits” that follow from accepting a proposition as true.³¹⁶ Dewey maintained that the standard of judgment in law lies “in the *function* of what goes on socially.”³¹⁷ Likewise, Cardozo insisted that law, including adjudication, must be understood in terms of social function.³¹⁸ The “final cause” of law’s very existence, he argued, is the well-being of society.³¹⁹ Cases come before courts, just as matters become placed on legislative agendas, to reconcile troublesome situations in social life. While several factors rightfully influence judicial decision-making, including logic, history, custom, and tradition,³²⁰ Cardozo claimed that “the final principle” of deliberation for judges and legislators alike “is one of fitness to [the] end” of social justice.³²¹ To fulfill their function, judges must “shape [their] judgment in obedience to the fundamental interest of society.”³²²

In this respect, adjudication, understood pragmatically, focuses on consequences. Of course it does. It is hard to fathom a jurisprudence that would even feign indifference toward the impact of law on society or the relationship between judging and justice. No jurisprudential tradition has ever taken such a foolhardy course. Natural law jurisprudence treats

314. *Id.* at 165; CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 208. *Accord id.* at 244–47 (discussing how the judicial process sometimes becomes a “creative agency” requiring “creative action” by the courts).

315. *See id.* at 217–20 (discussing and illustrating how indeterminacy requires the exercise of judicial choice); *id.* at 247 (“[E]very doubtful decision involves a choice. . .”).

316. JAMES, *PRAGMATISM*, *supra* note 21, at 110.

317. Dewey, *My Philosophy of Law*, *supra* note 224, at 122.

318. *See id.* at 217–20 (discussing and illustrating how indeterminacy requires the exercise of judicial choice); *id.* at 247 (“[E]very doubtful decision involves a choice. . .”).

319. *Id.* at 66. *Accord* CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 220 (“[In] the genesis and growth of the law, . . . social welfare is the final test . . .”).

320. *See* CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 30–31, 112, 141, 162; *THE GROWTH OF THE LAW*, *supra* note 294, at 213–20.

321. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 103. *Accord* CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 220, 238.

322. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 140.

benefitting the common good as a necessary condition for law.³²³ The philosophy of legal positivism, determinedly amoral in so many respects, nonetheless recognizes certain normative considerations, including the concept of justice and the principle of utility, as criteria affecting the soundness of legal norms.³²⁴ Popular contemporary legal theories that characterize the end of judicial practice in terms of integrity³²⁵ or efficiency³²⁶ find their theoretical justifications in consequences and the common good.³²⁷ So do theories of originalism in constitutional interpretation.³²⁸ Even Neil Duxbury's controversial work on the use of

323. See THOMAS AQUINAS, *SUMMA THEOLOGIAE*, in *ON LAW, MORALITY, AND POLITICS* Q. 90 art. 2, 4, Q. 96, art. 1, Q. 97, art. 2 (William P. Baumgarth and Richard J. Regan, eds., Hackett 1988) (1265–1274) (arguing that it is a necessary condition and principal objective for law that it be directed to the common good); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 125 (1980) (identifying, by the law of nature, “the requirement of favouring and fostering the common good of one’s communities” as the basis for “many, perhaps even most, of our concrete moral responsibilities, obligations, and duties”); SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 35 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) (“[T]he fundamental natural law is: every man ought to do as much as he can to cultivate and preserve sociality.”). Cf. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 23–24 (1998) (advocating a consequentialist, quasi-utilitarian defense of natural rights).

324. See, e.g., AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, *supra* note 187, at 37–63, 74–118; H.L.A. HART, *THE CONCEPT OF LAW* 153–80 (1961).

325. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 10–11, 103–10, 124–29 (1996); DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 225–75.

326. See POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 20, at 77–79; POSNER, *OVERCOMING LAW*, *supra* note 20, at 15–21, 437–43; POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 20, at 353–92; RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 60–115 (1981).

327. See, e.g., DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 225 (“[L]aw as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”); POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 20, at 78 (“My argument for judges’ trying to decide common law cases in a way that will promote efficiency is simply that it’s a useful thing that judges can do”); POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 326, at 115 (“I have tried to develop a moral theory that goes beyond classical utilitarianism and holds that the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society.”).

328. E.g., M.E. BRADFORD, *ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION* xv, 16, 130–31 (1993) (arguing that only by overcoming judicial distortion and honoring the Constitution as originally understood can the United States restore its constitutional integrity, secure liberty for future generations, and preserve its national character and standing among nations); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 218–19 (1999) (“[The courts] must adopt a jurisprudence of original intent. . . . Originalism is most capable of realizing the goals internal to the interpretive project itself and of actualizing the obligations of democratic constitutionalism . . . [and] promises to protect the Court from itself, and in so doing, to protect us from the Court.”); McGinnis & Rappaport, *supra* note 8, at 919–20, 925–28, 934–35 (advocating originalism in constitutional interpretation because it leads to better consequences than any other interpretive approach); Ralph A. Rossum, *Constituting and Preserving the Republic*, in *OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT* 111, 111 (Eugene W. Hickok, Jr., Gary L. McDowell, and Philip J. Costopoulos eds., 1993) (claiming that recovering the original principles and ideas of the constitution’s framers is essential for the preservation of the American constitutional system).

lotteries in legal decision-making sees recourse to sortition as justified only if it serves the well-being of society.³²⁹ It is hard to imagine a jurisprudential theory to the contrary. Little comfort—and even less common sense—would attend a theory of adjudication that pictured good judging in terms of disinterest in justice or indifference toward the common good. No one’s ideal judge is an insensitive arbiter who does not care or trouble to understand how the outcomes of his or her decisions impact real lives or affect concrete social interests. Rather, as expressed by Justice Cardozo in potent pragmatist language, “[t]he restraining power of the judiciary” is fulfilled only when judicial “power is exercised with insight into social values, and with suppleness of adaptation to changing social needs.”³³⁰

C. Restraints of Practice

Adjudication, understood pragmatically, thus constitutes a practical institution designed for the singular purpose of resolving conflict in a manner that enhances the social welfare. Yet Cardozo was quick to rebuff any result-oriented inferences that may be drawn from this functional end. Though a legal rule’s social value determines its legitimacy,³³¹ Cardozo cautioned against reducing the judicial function to a preference-based pursuit of short-term ends or expediency. He stated categorically: “I do not mean . . . that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise.”³³² For no court may “roam at large, and light upon one conclusion or another as the result of favor or caprice.”³³³ Judges may exercise creative choice only to fill gaps or resolve indeterminacies within the interstitial walls of precedent and practice. Not only do they lack freedom to venture “beyond the walls of the interstices,”³³⁴ but within those spaces their interpretive discretion is seriously circumscribed. “The judge, even when he is free,” Cardozo wrote, “is still not wholly free. He

329. See NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* 145 (1999) (“[T]he [justifiable] use of randomizing techniques [in legal decision-making would] have positive effects on people’s incentives and might also, on occasions, turn out to be cost-efficient and (more controversially) just.”).

330. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 94.

331. *Id.* at 73. Accord CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 236 (“We test the rule by its results.”).

332. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 66–67.

333. CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 204.

334. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 114.

is not to innovate at pleasure.”³³⁵ Judges work within a practice which restricts their freedom according to criteria “established by the traditions of the centuries, by the example of other judges, . . . by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.”³³⁶ Within this practice, no judge is a “knight-errant,” free to “roam[] at will in pursuit of his own ideal of beauty or of goodness.”³³⁷

To Cardozo, and to legal pragmatism, the practice of adjudication thus imposes on judges restrictions that vigorously delimit the exercise of discretion and creative choice. These restrictions cannot, however, “be staked out for [the judge] upon a chart.”³³⁸ The practice-bound factors identified by Cardozo—logic, custom and tradition, history, social standards of right and justice³³⁹—come to be understood by judges through experience in judging, as “in the practice of an art.”³⁴⁰ That experience brings judges to see that the mindset of result-orientation ill-fits the practice of adjudication. Deciding cases so as to achieve short-term ends or to maximize outcomes in particular cases according to standards determined outside judicial practice contravenes the judicial function, just as it undermines the concept of law.³⁴¹ For to Cardozo, one of the “most fundamental social interests” underlying the function of judicial practice “is that law shall be uniform and impartial.”³⁴² Ad hoc, result-oriented decision-making vitiates that core function of law, impairing the fundamental need for order in social life.³⁴³

Here, again, Cardozo’s account of the common law bespeaks the underlying pragmatic methodology of adjudicative practice. His claim that the first principle of law is “serene and impartial uniformity”³⁴⁴ corresponds to James’s insistence that consistency is the first criterion for

335. *Id.* at 141.

336. *Id.* at 114. *Accord id.* at 136–37 (“Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side.”).

337. *Id.* at 141.

338. *Id.* at 114. *Accord* CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 215–16 (dismissing the “yearning for mechanical and formal tests” for adjudication as grounded in “illusion” and sure to “carry us upon the rocks” if pursued).

339. *See* CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 112, 141, 162; *THE GROWTH OF THE LAW*, *supra* note 294, at 213–20.

340. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 114.

341. *See id.* at 139–40.

342. *Id.* at 112. *Accord id.* at 36 (“[S]erene and impartial uniformity . . . is of the essence of the idea of law.”). *Cf.* CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 186–87, 192 (discussing the importance of certainty and stability for law).

343. *See* CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 141.

344. *Id.* at 36.

truth. In entertaining the truth of a proposition, James argued that we look, first and foremost, for “consistency between the present idea and . . . our whole stock of previously acquired truths.”³⁴⁵ That is, the principal test for adding a new idea or datum of experience to our set of true beliefs is fit and consistency. We strive always for the intellectual satisfaction and repose that comes from possessing a belief-set that coheres internally as well as with the external facts of experience.

D. The Virtue and Limits of Stare Decisis

From this, it follows that, on a pragmatic account of adjudication, following precedent is the first principle and starting-point for judicial decision-making. Adherence to precedent, Cardozo argued, must be the rule in common law adjudication, not the exception.³⁴⁶ Only through the general following of precedent—through “symmetry and logic in the development of legal rules”³⁴⁷—does the common law achieve a degree of uniformity and impartiality. In addition to the general repose those fundamental social interests afford, following precedent further serves the principle of fairness and secures “faith in the even-handed administration of justice.”³⁴⁸

Cardozo thus firmly cautioned against marring the symmetry of law “by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason.”³⁴⁹ *Stare decisis*, he maintained, is the presumptive “everyday working rule of our law.”³⁵⁰ Yet sometimes in law, as in life, our settled beliefs face challenges sufficient to compel their reconsideration. The rules and principles that comprise the common law’s working hypotheses are neither singular nor simplistic. They form “complex bundles”³⁵¹ of truths born in social experience and “carry[ing] throughout their lives the birthmarks of their origin.”³⁵² Pursuing the virtue of consistency on occasion becomes an exercise in resolving conflicts between competing lines of precedent or reconciling inconsistencies arising when loyalty to the adjudicative criteria of logic,

345. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 105.

346. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 34, 149.

347. Jacobs & Young, Inc., 230 N.Y. 239, 242, *quoted in* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 44.

348. *Id.* at 34.

349. *Id.* at 33.

350. *Id.* at 20.

351. *Id.* at 64.

352. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 216.

history, custom, and tradition lead in different or equivocal directions.³⁵³ Such unsettling occasions of trouble in the legal environment require courts to exercise their residual power of creative choice.³⁵⁴ No one criterion of adjudicative practice overrides all others.³⁵⁵ Still, Cardozo insisted that in the exercise of creative choice, judges must defer to the “final cause of law”: social justice.³⁵⁶ When genuine conflict or ambiguity makes it uncertain “how far existing rules are to be extended or restricted,” courts must turn to considerations of fundamental justice and the social good to “fix the path, its direction and its distance.”³⁵⁷

Adherence to precedent, while the first principle of adjudication, is thus defeasible. To be healthy, law, like truth, must grow along lines of reason and the social good. For the most part, the law’s historical growth is silent and unconscious, reflecting the customary morality of a people over time.³⁵⁸ Yet Cardozo maintained that much of the law’s most significant historical development occurs through “conscious or purposed growth.”³⁵⁹ The occasions for such purposive growth are those troubling occurrences of conflict or ambiguity in the extension of a legal rule. In resolving those cases, the judicial focus sometimes must shift from “the particular to the universal,”³⁶⁰ i.e., from the narrow concerns of the parties in the individual case to the larger and more vital social interests at stake.³⁶¹ Precedent cases that stand opposed to the welfare of society must yield, Cardozo argued, to that fundamental end.³⁶²

Hence, the question of whether to honor the doctrine of *stare decisis* or set out on a new path presents to jurisprudence a most “vexed and perplexing problem.”³⁶³ While adherence to precedent is the “everyday working rule”³⁶⁴ of common law adjudication, it is not a rigid, inflexible judicial imperative. Adjudication in the common law tradition presents a complex process irreducible to a single formulaic command. Judging

353. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 64–65; THE GROWTH OF THE LAW, *supra* note 294, at 202.

354. See CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 214–18 (discussing how in highly contested cases courts cannot escape the obligation and pain of choosing).

355. *Id.* at 219, 220.

356. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 66. *Accord id.* at 137 (“[W]ithin this narrow range of choice [judges] shall search for social justice.”).

357. *Id.* at 67.

358. See *id.* at 104.

359. *Id.* at 105.

360. *Id.* at 140.

361. See *id.* at 139–40; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 192–93.

362. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 112–13.

363. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 239.

364. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 20.

requires a discretionary balancing and synthesis of a number of practice-driven criteria.³⁶⁵ Though *stare decisis*, to be sure, is the first principle in that balancing process, it is not an absolute standard overriding all other considerations.³⁶⁶ Cardozo insisted that to treat it as such would divest judges of their discretion, diminish the functional effectiveness of judicial practice, and subordinate social justice to the “demon of formalism.”³⁶⁷

From Cardozo’s pragmatist standpoint, the doctrine of *stare decisis* thus provides the starting-point for judicial decision-making, while the well-being of society marks the end-point. Our natural inclination toward “consistency between the present idea and . . . our whole stock of previously acquired truths,”³⁶⁸ coupled with the social value and comfort we gain from consistency and symmetry in legal doctrine, directs judges to begin their deliberations with a presumption favoring the following of precedent. Yet the presumption is rebuttable. If following a line of precedent cases or extending an established legal rule would work against social justice, then *stare decisis* must yield. Pursuing the instrumental values of certainty and symmetry becomes a “sham” if used to uphold cases that blemish the law as “deformities” or work against the social welfare.³⁶⁹ *Stare decisis* accordingly cannot justify perpetuating legal rules that have been rendered archaic and unworkable by changed social or technological conditions.³⁷⁰ It does not warrant reinforcing “the walls of ancient [legal] categories” that time has atrophied and now threaten to “become centers of infection if left within the social body.”³⁷¹ In sum, Cardozo was adamant: if a legal rule has become inconsistent with social justice, it should be abandoned.³⁷²

The vexing problem of whether to follow precedent thus cannot, from the standpoint of legal pragmatism, be resolved simplistically as if the

365. See *id.* at 112–15, 162–63.

366. See *id.* at 112–13, 150–52; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 192–93, 214–16, 239–41.

367. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 66.

368. JAMES, THE MEANING OF TRUTH, *supra* note 72, at 105.

369. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 192–93.

370. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 137, 151. Cardozo’s claim mirrors William James’s more general point that even the most widely held scientific and philosophical truths must succumb if experience proves them no longer workable. See also JAMES, PRAGMATISM, *supra* note 21, at 107 (“Ptolemaic astronomy, euclidean space, aristotelian logic, scholastic metaphysics, were expedient for centuries, but human experience has boiled over those limits, and we now call these things only relatively true, or true within those borders of experience. ‘Absolutely’ they are false.”).

371. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 193.

372. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 66, 150; CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 239–41.

outcome in complex, contested cases is preordained under unwavering devotion to precedent. For as Cardozo contended, the obligation to follow precedent is itself a principle of social justice. Certainty and uniformity command loyalty in judicial decision-making not *a priori* through natural reason, but because of the social interest they serve in helping make the common law “as deep and fundamental as the postulates of justice.”³⁷³ The high ideal of evenhandedness—of treating like cases alike—that the doctrine of *stare decisis* represents likewise is best understood as an imperative of practice, a necessary incident of an adjudicative enterprise where judges hold a degree of lawmaking power.³⁷⁴ In addition, the instrumental restraints that enterprise imposes on its practitioners not only confine them to working within “the walls of the interstices,”³⁷⁵ but deny them the power to elevate their personal preferences, including a judge’s principled choice to place abiding faith in certainty and precedent, above the social good.³⁷⁶ Since *stare decisis* receives its justificatory value from the social benefits it confers, to follow precedent that appears, on balance, to conflict with social justice amounts to a formalistic extirpation of the judicial function.³⁷⁷

This picture of common law adjudication, as a complex practice that at once treats following precedent as its “everyday working rule”³⁷⁸ while demanding that judges exercise their power “with insight into social values, and with suppleness of adaptation to changing social needs,”³⁷⁹ fully bears the imprint of pragmatist thought. Philosophical pragmatism posits consistency across the range of our beliefs as the first criterion of truth.³⁸⁰ Yet it further locates the creative genius of human cognition in our ability to craft concepts and theories that structure phenomena coherently as “mental modes of *adaptation* to reality”³⁸¹ that prove “instrumental to a control of the environment.”³⁸² Legal pragmatism likewise finds creative genius in judicial practice at the delicate balance-point between certainty and stability in predictable outcomes and conscious, purposive growth of legal doctrine. For as Justice Cardozo concluded: “Between these two

373. CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 192.

374. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 112–15.

375. *Id.* at 129.

376. *Id.*

377. See CARDOZO, THE GROWTH OF THE LAW, *supra* note 294, at 192–93.

378. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 20.

379. *Id.* at 94.

380. See JAMES, THE MEANING OF TRUTH, *supra* note 72, at 105.

381. JAMES, PRAGMATISM, *supra* note 21, at 94.

382. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC, *supra* note 22, at 30. See also DEWEY, EXPERIENCE AND NATURE, *supra* note 212, at 10–11.

extremes we have the conception of law as a body of rules and principles and standards which in their extension to new combinations of events are to be sorted, selected, moulded, and adapted in subordination to an end.”³⁸³ That end, again, answers not to grand theory or the achievement of specific results, but to the functional purpose of law and judicial practice, “the attainment of a just result.”³⁸⁴

VII. CONCLUSION

Just as the philosophy of pragmatism offers accounts of knowledge, truth, and reality that are distinctly modest in speculative pretensions, so legal pragmatism comprises a theoretically unadorned picture of adjudication. Applied to law, pragmatism spurns juristic abstractions. It rejects faith in absolute, full-blossomed legal truths. It assumes an agnostic attitude toward thick jurisprudential theory.³⁸⁵ Grand, formal explanations of the growth of legal concepts smack to pragmatism of nothing more than “tender-minded” intellectual longing.³⁸⁶ Legal pragmatism instead advances quite humble accounts of law and legal doctrine. It presumes that legal rules and principles can only be understood when examined contextually in the ordinary settings of their social birth. And it posits that legal doctrine can only be justified (or justifiably criticized) through investigating the internal processes and methods of law, especially the practice of judicial decision-making.³⁸⁷

Some critics of legal pragmatism accordingly disparage it as banal,³⁸⁸ as offering nothing more than a mundane account of ordinary judicial decision-making.³⁸⁹ Compared to the splendor of many grand theories of law, pragmatist jurisprudence does seem insipid. Economic theories of law

383. CARDOZO, *THE GROWTH OF THE LAW*, *supra* note 294, at 208–09.

384. *Jacobs & Young, Inc.*, 230 N.Y. at 242, *quoted in* CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 293, at 44.

385. *See* DEWEY, *My Philosophy of Law*, *supra* note 224, at 119–22; Dewey, *Logical Method and Law*, *supra* note 76, at 21–23, 26.

386. *See* James, *The Sentiment of Rationality*, *supra* note 66, at 64, *ESSAYS IN PRAGMATISM* 4.

387. *See, e.g.*, DEWEY, *My Philosophy of Law*, *supra* note 224, at 117 (arguing that law must be understood in its cultural context as an “intervening in the complex of other activities, and as itself a social process . . . [that] can be discussed only in terms of the social conditions in which it arises and of what it concretely does there.”); John Dewey, *The Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 660–62 (1926) (maintaining that legal matters must be analyzed in terms of their specific social consequences).

388. *See* Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW & SOCIETY*, *supra* note 7, at 89.

389. *E.g.*, Smith, *supra* note 2, at 444; Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 *AM. J. JURIS.* 315, 328 (1996); Tushnet, *supra* note 2, at 290.

encase legal doctrines in a foresighted rationalism that legal pragmatism cannot touch. Originalism in constitutional interpretation simplifies the search for constitutional meaning so deftly as to generate absolute constitutional truths that legal pragmatists, restrained by method and practice, cannot even fancy. Utilitarian jurisprudence, with its singular teleological end of achieving the best outcome overall, boasts a formulaic neatness that would leave the legal pragmatist sullen in envy were it not mere whimsy. Pragmatist jurisprudence quite simply cannot match the formulaic certainty and ornamental grandeur of such thick jurisprudential theories.

Yet the flatness of legal pragmatism provides the keystone for its descriptive and justificatory virtue. Pragmatism portrays law as a complex and variegated social phenomenon whose doctrines are best understood by staying close to the empirical conditions and practice-bound context of their growth.³⁹⁰ Perhaps more than anything, legal pragmatism admonishes judges, as well as legal theorists, to practice restraint in jurisprudential ambition. It cautions against hasty generalization from attractive working hypothesis to ultimate final truth. It counsels the adoption of workable rules and principles that serve the end of social well-being, the final cause of law's very being. While it conceives of law as a wholly human-made affair, it urges restraint by judges and disallows roaming at will beyond the interstitial walls that precedent and practice erect. And while its instrumental orientation calls upon judges to adapt the law as necessary to control trouble in the social environment, legal pragmatism treats following precedent as the first rule of adjudication for judges working in the common law tradition. For in law, as in life, maintaining a coherent set of beliefs is the first requisite for achieving intellectual satisfaction. If a challenge arises in some corner of a legal system's set of doctrinal beliefs, the legal pragmatist's first inclination is to hold fast to precedent. If maintaining the settled law is not possible, then pragmatism counsels judges to overrule guardedly, so as to achieve "a minimum of jolt, a maximum of continuity."³⁹¹

Given its commonplace approach to jurisprudence and the marked conservatism of its method, it is remarkable that legal pragmatism churns so much anxiety among so many legal scholars. Perhaps the disquiet, particularly the worry about result-orientation, comes from those who only know of pragmatism through the works of Richard Rorty or Richard

390. See DEWEY, *My Philosophy of Law*, *supra* note 224, at 117–20.

391. JAMES, PRAGMATISM, *supra* note 21, at 35.

Posner. Rorty's postmodern pragmatism does assume a utilitarian and result-oriented cast.³⁹² It does encourage epistemological flexibility and interpretive flamboyance.³⁹³ Yet the philosophy of pragmatism did not begin or end with Richard Rorty. While his strand of postmodern pragmatism enjoys a loyal following in certain circles, it represents only a small slice of pragmatist thought. In many respects it is an outlier. For despite Rorty's frequent honorifics to John Dewey,³⁹⁴ the form of pragmatism he advances stands in pointed contrast to pragmatism's classical and analytic tradition.³⁹⁵

Likewise, Judge Posner's theory of pragmatic adjudication advocates a number of positions at odds with the analytical legal pragmatism discussed herein. He embraces a non-objective view of truth,³⁹⁶ considerable flexibility toward whether to follow precedent,³⁹⁷ a robust consequentialism,³⁹⁸ and, of course, his signature call for free market determinism.³⁹⁹ None of these positions reflect the philosophy of

392. See, e.g., RORTY, *PHILOSOPHY AND SOCIAL HOPE*, *supra* note 20, at 84–86, 186, 268, 273, 276 (identifying pragmatism with utilitarianism); Richard Rorty, *Pragmatism as Romantic Polytheism*, in *THE REVIVAL OF PRAGMATISM*, *supra* note 84, at 21–25, 29 (characterizing his philosophy as one of “romantic utilitarianism”).

393. See, e.g., RORTY, *Pragmatism, Relativism, and Irrationalism*, in *CONSEQUENCES OF PRAGMATISM*, *supra* note 20, at 160, 163–65 (characterizing pragmatism as blurring the epistemological difference between what is and what ought to be); Rorty, *Postmodernist Bourgeois Liberalism*, *supra* note 20, at 333 (arguing that nothing has any genuine moral force).

394. E.g., RORTY, *PHILOSOPHY AND SOCIAL HOPE*, *supra* note 20, at 5, 12, 14–20, 35–39, 66, 73–77, 88, 272–73; RORTY, *Overcoming the Tradition: Heidegger and Dewey*, in *CONSEQUENCES OF PRAGMATISM*, *supra* note 20, at 37, 40–54; RORTY, *Dewey's Metaphysics*, in *CONSEQUENCES OF PRAGMATISM*, *supra* note 20, at 72, 72–88; Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *supra* note 388, at 91–94; Rorty, *Postmodernist Bourgeois Liberalism*, *supra* note 20, at 335.

395. See PUTNAM, *PRAGMATISM: AN OPEN QUESTION*, *supra* note 123, at 64 (1995) (describing certain aspects of Rorty's philosophy as “unpragmatist”); NICHOLAS RESCHER, *REALISTIC PRAGMATISM: AN INTRODUCTION TO PRAGMATIC PHILOSOPHY* xi–xii (2000) (“[Defending] the pragmatic tradition against [Rorty's] sort of deconstruction into philosophical vacuity.”); David Bakhurst, *Pragmatism and Ethical Particularism*, in *NEW PRAGMATISTS* 122, 128–40 (Cheryl Misak ed., 2007) (distinguishing Rorty's sense of pragmatism from Dewey and others in the analytic pragmatist tradition); Catherine Z. Elgin, *Review of Richard Rorty's Consequences of Pragmatism*, 21 *ERKENNTNIS* 423, 427 (1984) (criticizing Rorty as offering positions “alien to the pragmatist spirit”); Ian Hacking, *On Not Being a Pragmatist: Eight Reasons and a Cause*, in *NEW PRAGMATISTS*, *supra* at 32, 33 (calling Rorty a “neo-pragmatist” to distinguish him from the classical pragmatists); Hilary Putnam, *Pragmatism and Realism*, *supra* note 84, at 37–51 (contrasting William James's “natural realism” and his own “internal realism” with Rorty's metaphysical antirealism).

396. E.g., POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 20, at 114–29, 197–219, 466.

397. See, e.g., POSNER, *HOW JUDGES THINK*, *supra* note 20, at 42–46, 54, 275–77; POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, *supra* note 20, at 252–53, 261; POSNER, *OVERCOMING LAW*, *supra* note 20, at 125–26; POSNER, *THE PROBLEMS OF JURISPRUDENCE*, *supra* note 20, at 92–98, 374–75, 455–56.

398. See *supra* notes 170–75 and accompanying text.

399. See, e.g., POSNER, *HOW JUDGES THINK*, *supra* note 20, at 35–40, 77; POSNER, *LAW, PRAGMATISM, AND DEMOCRACY*, *supra* note 20, at 2, 24–56, 77–79, 81; RICHARD POSNER,

pragmatism. But that should not be surprising, for Judge Posner admits that what he means by pragmatism has little in common with philosophical pragmatism. He expressly distances himself from the philosophy of pragmatism, abjuring it as unhelpful in understanding law or judicial practice.⁴⁰⁰ The theory of pragmatic adjudication he advances is one of “everyday pragmatism.”⁴⁰¹ It is a mindset reflecting the popular, common sense usage of the term “pragmatism”—so popular, so everyday, as to be described by Posner as “the untheorized cultural outlook of most Americans.”⁴⁰² Hence, given his project and express repudiation of philosophical pragmatism, nothing Judge Posner says should be taken as bearing on legal pragmatism insofar as it is grounded in the tradition of pragmatist philosophy.

Whatever warrant there may or may not be for attributing a result-oriented standpoint to the postmodern and everyday pragmatisms of Rorty and Posner, that charge holds no merit against the classical and analytic strand of legal pragmatism chronicled herein. Unfortunately, when legal theorists like David Luban, Ronald Dworkin, or others impugn legal pragmatism for allegedly advancing an unbridled consequentialism, they do so in the most general of terms. They speak of a generic pragmatism. Typically, they do not trouble themselves to document specific sources for the positions they tag as representative of pragmatist thinking.⁴⁰³ To a disturbing degree, those positions mischaracterize pragmatism in straw man fashion. Specifically as to the charge of result-orientation, the picture of legal pragmatism they paint is of a jurisprudence that would reconstruct adjudication in the most unbecoming ways. They fashion a capricious pragmatism so singularly focused on achieving the best social outcomes as

FRONTIERS OF LEGAL THEORY 6, 95–141 (2001); POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 239; POSNER, OVERCOMING LAW, *supra* note 20, at 15–21, 403–05; POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 20, at 353–92.

400. *E.g.*, POSNER, HOW JUDGES THINK, *supra* note 20, at 233–34 (claiming that legal pragmatism is not dependent upon nor derived from philosophical pragmatism); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20, at 10–13, 23, 41–49 (arguing that classical and analytic philosophical pragmatism offer little toward understanding legal discourse or practice); POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY, *supra* note 20, at 227 (asserting that he uses the term pragmatism “in a distinctly low-key sense . . . in particular *not* the sense in which it is used to name a philosophical position”).

401. *See* POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 20 *passim*.

402. *Id.* at 50.

403. *See, e.g.*, DWORKIN, LAW’S EMPIRE, *supra* note 4, at 151–64 (criticizing pragmatist legal analysis at length without one reference or citation to support the positions he attributes to pragmatism); McGinnis & Rappaport, *supra* note 8, at 917–20, 927–28, 934–35 (offering a so-called pragmatic justification for originalism in constitutional interpretation, yet providing no account of pragmatism other than to treat it as caring about good consequences).

to sanction nearly anything in judicial decision-making.⁴⁰⁴ Instead of appeal to principle or integrity, this fictional pragmatism is said to recommend judging by trickery⁴⁰⁵ and “crude experimentalism.”⁴⁰⁶ It is presented as incapable of valuing logical coherence or historical consistency in legal decision—deficiencies alleged to blind it to the virtue of following precedent, except when convenient to attain desirable consequences.⁴⁰⁷

This picture certainly does portray a lame legal theory. No wonder so many legal scholars mimic Tom Stoppard’s Guildenstern with a rueful, “Pragmatism?!—is that all you have to offer?”⁴⁰⁸ But the picture is a chimera that seriously mismeasures pragmatist jurisprudence. For in its classical and analytic tradition, pragmatism is anything but a boorish result-oriented philosophy. As William James stated over and over, pragmatism offers only a method of deliberative inquiry.⁴⁰⁹ It does not champion any special results, commend any doctrines or dogmas, or countenance any conclusions or truths *a priori*. Those truths it does sanction come only by way of reflective inquiry, guided by the hindsight of experience and directed with foresight toward the resolving of some trouble or uncertainty clogging human affairs. In this respect, pragmatism does indeed look to the consequences of inquiry. Yet similar to Kant in the ethical realm, it does so non-consequentially. For unlike utilitarianism, pragmatism does not accept a proposition as true or a course of action as right because it leads to better social consequences than its alternatives. Rather, pragmatism looks to consequences as indicia in the measurement of truth. If a proposition or judgment satisfies intellectually by working to resolve some trouble or confusion while fitting logically within a comprehensive system of belief, it counts consequentially as “*good in the way of belief*,”⁴¹⁰ i.e., true.

As expressed so eloquently by Justice Cardozo, this pragmatist conception of deliberation and truth models perspicuously the common law method of adjudication. Cardozo embraced legal pragmatism for several reasons. He liked how it rejects absolutism, treats legal rules and principles as working hypotheses, and dissuades judges from fashioning

404. See *supra* text accompanying notes 10–18, 161–69.

405. See Weinberger, *supra* note 14, at 415.

406. Cook, *supra* note 5, at 1445.

407. See DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 95, 151; Luban, *supra* note 10, at 43, 45.

408. STOPPARD, *supra* note 1, at 58.

409. E.g., JAMES, *THE MEANING OF TRUTH*, *supra* note 72, at 37; PRAGMATISM, *supra* note 21, at 29, 31.

410. JAMES, *PRAGMATISM*, *supra* note 21, at 42.

themselves quixotic adventurers free to pursue their own ideals of justice and the common good. From pragmatism's concurrent emphases on consistency and measured growth in matters of truth and judgment, he drew philosophical justification for the common law's principled commitment to *stare decisis* as its "everyday working rule"⁴¹¹ while still allowing conscious, purposive growth in legal doctrine. In no respect did Cardozo see in legal pragmatism a result-oriented jurisprudence. Nor should we. For when applied to law and jurisprudence, pragmatism in its classical and analytic sense commends only one result—justice.

411. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 293, at 20.